Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-839

ROBERT P. WHALEN, as Commissioner of Health of the State of New York,

Appellant,

against

RICHARD ROE, an infant by ROBERT ROE, his parent; JOHN DOE, an infant by MARY DOE, his parent; JAMES MOE, an infant by MICHAEL MOE, his parent; JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER and EMPIRE STATE PHYSICIANS GUILD, INC.,

Appellees,

and

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG, and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

This is a direct appeal from the final order and judgment entered on October 9, 1975 by a district court of three judges constituted pursuant to 28 U.S.C. §§ 2281 and 2284 (J.S. 18a).* The final order and judgment declared unconstitutional and enjoined enforcement of three specific provisions of Article 33 of the New York Public Health Law

* Numbers in parentheses preceded by "J.S." and followed by "a" refer to pages of the appendix following appellant's Jurisdictional Statement herein. Numbers in parentheses followed by "a" refer to pages of the appendix. Numbers in parentheses preceded by "Ex." refer to plaintiffs' exhibits. Names in parentheses followed by the abbreviation "Tr. Dep." and a number (e.g., Bonacci Tr. Dep. 41) refer to pages of trial depositions considered by the Court pursuant to Consent Pre-Trial Order No. 2 (*infra*, p. 6, fn. and Addendum) but not included in the appendix.

(hereinafter "Article 33" or the "Act")—§§ 3331(6), 3332 (2)(a) and 3333(4)—"insofar as they require disclosure to the State of New York of the identity of patients receiving prescriptions for Schedule II controlled substances" (J.S. 14a-17a at pars. 1, 2). In addition, the judgment directed the destruction of New York prescription forms previously filed pursuant to the statute, the expungement of patients' names from records made from the prescription forms and the filing of an affidavit describing the time, place and manner of such destruction and expungement (J.S. 14a-17a at pars. 3, 4). At the request of the State, a stay of the paragraphs of the judgment relating to destruction of the records and expungement of patients' names was granted by the three-judge court pending disposition of appellant's appeal or other order of this Court (J.S. 16a at par. 5). The State's applications for a broader stay were denied by the three-judge court on October 20, 1975 (6a, 8a) and by Justice Marshall on October 28, 1975 (J.S. 39a-43a, *Roe* v. *Whalen* (opinion in chambers), —U.S.—, 46 L.Ed. 2d 18 (1976)).

Statement of the Case

Prior Proceedings

Proceedings prior to trial herein are set forth in the three reported opinions, *Roe* v. *Ingraham,* 357 F. Supp. 1217 (S.D.N.Y. 1973) (32a-40a) *rev'd.* 480 F. 2d 102 (2d Cir. 1973) (41a-54a), on remand 364 F. Supp. 536 (S.D.N.Y. 1973) (three-judge court) (57a-76a) and in Appellee's Motion to Affirm herein (pp. 3-4). The trial was held in December, 1974, pursuant to Consent Pre-Trial Order No. 2 made on November 21, 1974 which provided that the trial testimony of plaintiffs' expert witnesses and defendant's witnesses would be submitted to the Court in

deposition form, and that the remainder of the trial would take place before the three-judge court (Addendum at pp. A-1-A-2).

On August 13, 1975, the three-judge court filed its unanimous opinion holding that "so much of the New York Health Law as requires reporting to state authorities in Albany the names and addresses of patients who receive Schedule II drugs as medication prescribed by duly licensed physicians is an unconstitutional interference with plaintiff's right of privacy guaranteed under the Fourteenth Amendment" (J.S. 13a). The opinion is reported as *Roe* v. *Ingraham,* 403 F.Supp. 931 (S.D.N.Y. 1975).

The Court noted that "[a]n individual's physical ills and disabilities, the medication he takes, the frequency of his medical consultation are among the most sensitive of personal and psychological sensibilities" (J.S. 10a); recognized that "there is legitimate concern that information that one, one's children or an intimate is under treatment with such drugs not be broadcast to unauthorized sources" (J.S. 10a); stated that "the state effort to control drug abuse and to prevent illicit trafficking in dangerous drugs fosters a legitimate state purpose" (J.S. 11a); found that "admittedly the only purpose this information [names. addresses and ages of patients receiving Schedule II drugs] serves is to identify individual patients who without using an alias go from doctor to doctor to secure Schedule II drugs and those individuals who secure more than a 30-day supply in any single month" and that "[d]uring the 20-month life of the program only one such unresolved incident in this category has been unearthed" (J.S. 11a); and held that "[t]he diminution of a constitutionally guaranteed freedom is to great a price to pay for such a small governmental yield" (J.S. 11a). 403 F. Supp. at 937.

Plaintiffs' Claim

Roe, et al. v. *Ingraham* was brought by four patients,* including three infants and one adult receiving medications set forth in Schedule II of § 3306 of the New York Public Health Law (hereinafter "Schedule II drugs") (10a, 114a-115a, 137a, 170a-171a, 211a-212a), two named doctors who prescribed such drugs (10a, 146a-148a, 184a-185a), and The Empire State Physicians Guild, Inc., a New York Membership Corporation representing the interests of certain New York physicians (10a, 185a).** *Patient, et al.* v. *Ingraham* was brought by a post-operative cancer patient and an individual suffering from migraine headaches, both of whom received Schedule II drugs as medication (15a, 140a-143a, 195a-198a), the doctor of one of these patients (15a, 203a-210a) and The American Federation of Physicians and Dentists (15a).

The gravamen of plaintiffs' claim was that certain provisions of Article 33 are unconstitutional insofar as they require physicians and pharmacists to file with the State of New York prescriptions revealing the identity of patients using Schedule II drugs. The challenged provisions require (a) that all Schedule II drugs be prescribed on prescription forms containing, *inter alia,* the name, address and age of

* The State asserts that the patient plaintiffs are "anonymous" (Appellant's Br., p. 5). This is incorrect. The identity of the patient plaintiffs was provided to defendant and the Court below and all plaintiffs testified in open court during the trial. To protect their privacy, however, the Court permitted such plaintiffs to prosecute the action under pseudonyms (113a-114a).

** It is respectfully submitted that the State's allegations regarding the Empire State Physicians Guild, Inc. and the "financial backing" of the instant action (Appellant's Br., p. 5, fn. (*)) go beyond irrelevancy and immateriality to constitute scandalous matter which could properly be stricken under Rule 40(5) of the Rules of this Court. The matter was fully aired on numerous occasions in the lower courts and again at length on the application to Justice Marshall for a stay (see Appellees' Memorandum in Opposition to Application for a Stay of Judgment at pp. 29-30; see also 164a-167a).

the patient (§3332(2)) and (b) that copies of such prescription forms for Schedule II drugs, which in every case contain the identity of persons using the medication, must be sent to the Department of Health of the State of New York each and every time they are prescribed (§§3331(6) and 3333(4)). Plaintiffs contended that the foregoing provisions violate the Fourteenth Amendment of the United States Constitution in that they unnecessarily invade the patient's right of privacy and the doctor's right to prescribe treatment for his patients solely on the basis of medical considerations.

Operation of the State's System

The information acquired by the State is "coded" into a centralized computer and used in enforcement of Article 33 (91a-98a). The Act contains no limitation on the sweeping requirement that copies of all prescriptions for Schedule II drugs (including thereon the names of the patients) must be filed. There is no provision for any summons, either judicial or administrative, as the means whereby the Department of Health is required, in the usual case, to demand reports from doctors and pharmacists. The Department of Health is required by the Act to demand and obtain such reports routinely, automatically, from all physicians and pharmacists in the State without any process whereby physicians or pharmacists or patients may test in advance the reasonableness of the demand. Until entry of the final order and judgment below, approximately 125,000 prescriptions were received each month by the State (474a) and were coded into the computer by a staff of over 30 persons—seventeen clerks to open, code, sort and batch the forms in preparation for computerization (484a) and fourteen key punch operators (92a at par. 5).

At the trial, testimony by Dr. Arthur G. Baker (hereinafter "Dr. Baker"), Associate Commissioner of

Health for Community Health Services was received into evidence (Ex. 37).* Dr. Baker has overall responsibility for the triplicate prescription program (91a). Two Bureaus under his jurisdiction have responsibilities relating thereto —the Bureau of Narcotic Control (hereinafter "BNC") and the Bureau of Controlled Substances, Licensing and Evaluation (hereinafter "BCSLE") (91a). The BNC, under its director, John J. Bellizzi (hereinafter "Bellizzi"), is responsible for conducting investigations of alleged violations of Article 33. The BCSLE, under its director, Joseph L. Cannizzaro (hereinafter "Cannizzaro"), is responsible for processing filed prescriptions, security and retention of the triplicate prescription information and transmitting such information to the BNC (91a). In addition, the Office of Electronic Data Processing ("OEDP") participates in processing the prescriptions by transferring the information from the prescription blanks to discs to tapes which can be "read" by the computer (91a-92a). The director of OEDP, since March 1974, has been Joseph Bonacci, and prior thereto was Harold Gottheim (92a).

Although many printouts were issued by the State's System (95a-97a), the only printout containing patient names was a printout setting forth the names of patients with prescriptions of Schedule II drugs totaling in excess

* Because it was not included in the Appendix prepared by Appellant, we have set forth in full as an Addendum to this brief Pre-Trial Order No. 2 on Consent filed in the Court below on November 22, 1974 (3a). As appears therefrom (see Addendum, *infra*), it was stipulated by the parties and ordered by the Court that only the testimony of the plaintiffs would be heard in open court by the three-judge panel, with the remaining witnesses and exhibits submitted in the form of depositions. There were few objections to such exhibits and testimony and, in any event, by its order of July 28, 1974 (5a) and its opinion herein (364 F.Supp. 536 [S.D.N.Y. 1973]; 57a-76a), the Court received in evidence all such trial depositions and exhibits. Portions of the pre-trial deposition testimony of Dr. Baker were one such exhibit.

of a 30-day supply processed in one month (422a-423a).* Dr. Baker confirmed that this was the only information from the computer which would contain patients' names (95a, par. 12) and that its only purpose was to assist in the identification and investigation of persons who, using the same name, go from doctor to doctor to obtain an illicit supply of Schedule II drugs (95a, par. 12; Ex. 37, p. 139). Patients' names on the computer do not assist in detecting forgeries (Ex. 37, pp. 118-20), raised prescriptions (Ex. 37, p. 129), thefts (Ex. 37, p. 126), over-prescribing or over-dispensing (Ex. 37, pp. 120-21, 126-129). Such violations are currently being detected by printouts which do not use patient names (504a-511a; Ex. 14-16). Thus, the State has stipulated that the only purpose of requiring patients' names on the prescription forms filed with the defendant is to assist the State in identifying "persons who, using the same name, go from doctor to doctor to obtain an illicit supply of Schedule II drugs" (95a, par. 12).

The number of case reports of such violations was as follows from January 1, 1969 to May 12, 1974 (95a, par. 12):

1974	1 case
1973	None
1972	None
1971	1 case
1970	1 case
1969	1 case

* In addition, it was revealed for the first time at the trial, and contrary to the stipulated facts (95a, par. 13) that BNC also receives printouts when it requests information relating to a particular subject under investigation (423a-424a). No evidence was offered as to the criteria used in determining whether BNC should receive such printouts or the aid, if any, to BNC investigations resulting from such printouts. As of May 21, 1974, when he testified on deposition in this case, Mr. Bellizzi said that the computerized information had been of no use whatever to BNC (98a, par. 16).

Since May 1974, BCSLE, under Mr. Cannizzaro, has uncovered one additional patient, by use of the computer, who had possibly gone from doctor to doctor to obtain excessive amounts of drugs within a 30-day period and referred his name to BNC (97a, par. 15). Thus, the computerized system uncovered a grand total of two patients who may have gone from "doctor to doctor" to obtain excessive amounts of Schedule II drugs. The two referrals were investigated by BNC. One investigation disclosed a *bona fide* patient relationship (97a-98a, par. 15). The other was still pending at the time of trial (*id.*). There was no evidence that any of the three prior case reports in 1969, 1970 or 1971 had resulted in any enforcement action by BNC (*id.*).

Adequacy of the Provisions to Protect Against Malicious or Careless Disclosure

The triplicate prescriptions were processed on a Burroughs 3500 computer, which was to be replaced by a Burroughs 6700 computer (98a, par. 17). There are approximately 22 terminals that have access to the computer (Bonacci Tr. Dep. 77) but at present not to the triplicate prescription data. However, adjustments to the computer which would permit such access could be completed within two or three weeks after they were authorized (Bonacci Tr. Dep. 39-40; Ex. 40, p. 85).

Joseph J. Wasserman, an acknowledged expert in the security of computerized data (297a-300a; Ex. 41), examined the State's computer facility in Albany and concluded that, because of inadequate security, there is a substantial risk of unauthorized disclosure of the triplicate prescription information (321a). His testimony was uncontradicted.

Effects on Plaintiffs

Doctor plaintiffs observed the injuries to their patients directly resulting from fears of the effects of the Act's filing requirements (154a, 186a-187a). One plaintiff, a neurologist and psychiatrist, terminated treatment by use of Schedule II drugs for 15 to 20 patients suffering from schizo-affective mental disorders, even though such drugs were medically indicated and highly beneficial, because the patient-physician relationship would be endangered by the suspicions created (154a-155a, 168a-169a). Others found that a large number of patients refused to continue using Schedule II drugs upon learning of the filing requirements (177a-181a, 186a-187a, 211a-214a). Yet another physician refused to prescribe Schedule II drugs, even to relieve pain after surgery, because of his apprehension of misuse of the filed information (203a-208a).

All the patient plaintiffs feared massive computerization by the State (114a-118a, 138a, 140a-143a, 170a-171a, 211a-212a). One patient plaintiff first tried substitute drugs and, when they did not yield satisfactory results, he obtained the required medicine in New Jersey where the information would not be put on a computer (196a-197a). Another patient plaintiff disregarded the advice of her son's pediatrician and refused to permit her son to continue receiving prescriptions for Schedule II drugs when she learned that the prescriptions therefor containing his identity would be placed on the State's computer in Albany (170a-172a).

The disturbing psychological effect of awareness by an individual that the State is accumulating personal data about him is well known. When such awareness occurs in the stressful context of a patient seeking aid from a physician, the harmful effect is heightened (249a-250a, 255a). A highly qualified psychologist (234a-239a) described such

effects which include increased incidence of conforming behavior and withdrawal, lowered productivity at school or work, fear of government and physical symptoms (240a-252a). The evidence is uncontradicted that patients' apprehensions of centralized massive filing will have a substantial negative psychological impact on a significant number of persons (252a-253a).

Legislative History of the Act

The legislative history of the Act*, as detailed in Point III A 1, *infra,* reveals that no consideration at all was given to the question whether there is any need for the filing and computerization of patients' names. Most of the legislative history is devoted to provisions of Article 220 of the Penal Law (enacted together with Article 33) and to provisions of Article 33 not challenged hereby or relevant to this case. In the rare instances where the triplicate prescription provisions are discussed—principally on two pages of the 1972 Interim Report (Ex. 32, pp. 21-2) and the Hardt Memorandum (Ex. 33)—the discussion consists of generalized and unsupported claims that they will assist in enforcement of the Act. Thus, the 1972 Interim Report states that the objects of the triplicate prescription provisions are to enable the Department of Health "to compile data which will uncover irregularities such as forgeries, fraudulent obtaining of schedule II substances, and thefts of prescription blanks and their misuse by unauthorized persons" and to enable the Department to determine "if a patient has

*Hearings were held by the Temporary State Commission to Evaluate the Drug Laws which issued interim reports in 1971 (Ex. 31) and 1972 (Ex. 32, pp. 96-134). In addition, shortly prior to passage of the bill by the New York State Legislature, Chester R. Hardt, Chairman of the Temporary State Commission, issued a memorandum (Ex. 33) (hereinafter the "Hardt Memorandum"). It was stipulated that, for purposes of this action, these three documents constitute the legislative history of the Act (81a-82a).

obtained prescriptions by going from doctor to doctor, or if stolen prescriptions are being used" and "where there has been an over-prescribing or over-dispensing of schedule II drugs" (Ex. 32, p. 21). The Hardt Memorandum states that the triplicate prescription procedure is designed to reveal "physicians who have prescribed and dispensed a greater amount of a Schedule II substance than could possibly be justified by the nature of their practice" and "situations arising from lost or stolen prescriptions" (Ex. 33, p. 4).

The evidence in this case, as detailed in Point III A, *infra,* shows that, to the extent they suggest that patients' names are needed, such claims are baseless; that over-prescription, over-dispensing of drugs and abuses resulting from thefts and forgeries of prescription blanks can all be detected equally well without centralized filing of patients' names; and that the sole remaining abuse cited, the obtaining of illicit amounts of drugs by going from "doctor to doctor" is minimal. These facts were not considered by the legislature.

Nowhere in the legislative history is there any discussion as to whether the patient's name is required on the copy of the triplicate prescription form filed in Albany, whether accomplishment of the Act's objectives could be achieved equally well without the patient's name, whether the patient's identity is actually required in order to correct any abuse and, if so, whether the abuse cited is sufficiently widespread to warrant disclosure to the State of the patient's identity in the manner provided by the Act (see Ex. 31-33).

* * *

In summary, the evidence demonstrated a complete absence of any need for patients' names, and substantial risk of disclosure of such names to unauthorized individuals.

Summary of Argument

1. Decisions of this Court make clear that there exist constitutionally protected zones of privacy. In particular, *Roe* v. *Wade,* 410 U.S. 113 (1973), *Doe* v. *Bolton,* 410 U.S. 179 (1973) and *California Bankers Ass'n* v. *Shultz,* 416 U.S. 21 (1974), when read together, hold that the Constitution protects individuals from massive, automatic production of their intimate records to the state without judicial supervision. The centralized filing required under Article 33 is thus distinguishable from the production of designated records relating to one individual under investigation involved in such recent opinions of this Court as *Fisher* v. *United States,*——U.S.——, 96 S. Ct. 1569 (1976) and *United States* v. *Miller,*——U.S.——, 96 S. Ct. 1619 (1976).

Both judicial authority and the evidence in this case demonstrate that the statutorily required centralized filing of prescriptions for drugs required by thousands of individuals for legitimate medical reasons infringes three aspects of the right to privacy: (1) the "individual's interest in keeping to himself the existence of his physical ailments and his doctor's prescriptions for them" (*Roe* v. *Ingraham,* 480 F.2d 102 at 108; 51a); (2) the patient's "right to receive medical care in accordance with her licensed physician's best judgment" (*Doe* v. *Bolton,* 410 U.S. 179, 197 (1973)); and (3) "the physician's right to practice" (*id.* at 199).

Plaintiffs neither concede nor reach the question of whether prior New York State law which required pharmacists to retain copies of prescriptions and permitted state investigators to examine such prescriptions was unconstitutional. Rather they contend that whatever the constitutionality of prior practice, the instant procedure creates a far greater likelihood of invasion of privacy in that it requires automatic collection of vast volumes of

personal data by a centralized state agency without judicial supervision.

2. Intrusion by the state upon constitionally protected zones of privacy should be permitted only if justified by a compelling state interest. Furthermore, the relationship between the intrusion and the state interest allegedly served should not be based on mere conjecture of state officials but should be required to be demonstrated evidentially.

These requirements are particularly appropriate in the case of centralized, computer-assisted collection of medical data because of the personal and intimate nature of such data. Courts, legislatures, and commentators have increasingly recognized that the threat to privacy posed by computerized data systems requires new safeguards of individual rights in this area.

The State's assertions that affirmance of the lower court's judgment would result in a revival of substantive due process and would render all state statutes affecting the confidentiality of the doctor-patient relationship unconstitutional are baseless. The discredited doctrine of *Lochner* v. *New York,* 198 U.S. 45 (1905), permitted judicial scrutiny of legislative goals. Appellees in this case concede that control of dangerous drugs is a legitimate state goal, but contend that such a goal cannot legitimize massive intrusion into the private lives of individuals where the intrusion does not in fact serve the goal of controlling drug abuse.

3. Under either a compelling state interest or rational basis test, the instant statute's constitutionality cannot be sustained. The State has stipulated that the only need for centralized filing of patient names is to counteract the alleged problem of patients going to several doctors using the same name to obtain excessive amounts of Schedule II drugs (95a, par. 12).

In its brief in this Court, the State has (improperly) for the first time referred to alleged facts *dehors* the record supporting its claim regarding the seriousness of the "doctor to doctor" problem. However, at trial where the State had a full opportunity to develop such "facts", the uncontradicted evidence was that this problem has been insignificant historically (2 cases in 4 years). Neither does the legislative history of the Act give any support to the notion that this problem provides a basis for the centralized filing requirement. Furthermore, the federal government, the Commissioners on Uniform State Laws and the overwhelming majority of states which have considered triplicate prescription leglislation have not found it necessary to intrude upon the privacy of the physician-patient relationship by a filing requirement such as the one challenged hereby.

While appellees submit that the demonstrated lack of need for the challenged statutory provisions is decisive in the instant case, it has also been amply demonstrated that the State has failed to take reasonable precautions to maintain the security of prescriptions collected. Both published material and evidence in this case indicate that the executive branches of the federal and state governments have been unable to maintain security of confidential information. In addition, uncontradicted expert testimony directed specifically toward the State's system for processing and maintaining the triplicate prescription data demonstrated serious deficiencies in security.

It is submitted that this potential for abuse of the information collected coupled with the total lack of a rationale for the collection requires affirmance of the judgment of the Court below.

4. All plaintiffs clearly have standing to sue. The physician plaintiffs' freedom to practice medicine based solely on medical considerations is undermined by the effect on the

patient when he learns of the filing requirement, *Doe* v. *Bolton,* 410 U.S. 179, 199 (1973). The physician, also, is the one against whom the license revocation sanctions of Article 33 operate, *Doe* v. *Bolton, supra, at* 188-9. The patient plaintiffs' right of privacy is infringed by the required disclosure of intimate information to the State. Moreover, every plaintiff in the case (or such plaintiff's child) has been prescribed Schedule II drugs and thus is directly affected by the Act, *Roe* v. *Wade*, 410 U.S. 113, 123-125 (1973). Finally, the plaintiff physician organizations have standing to protect the rights of their members to practice medicine according to the highest medical standards, *NAACP* v. *Alabama,* 357 U.S. 449, 459 (1958).

POINT I

The Challenged Provisions Invade the Constitutional Right of Privacy.

A. The Nature of the Right.

In *Roe* v. *Wade,* 410 U.S. 113 (1973), this Court held that the right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action" (p. 153) and described its genesis and varying contexts as follows (pp. 152-3):

> "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co.* v. *Botsford,* 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969); in

the Fourth and Fifth Amendments, *Terry* v. *Ohio,* 392 U.S. 1, 8-9 (1968), *Katz* v. *United States,* 389 U.S. 347, 350 (1967), *Boyd* v. *United States,* 116 U.S. 616 (1886), see *Olmstead* v. *United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold* v. *Connecticut,* 381 U.S., at 484-485; in the Ninth Amendment, *id.,* at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko* v. *Connecticut,* 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving* v. *Virginia,* 388 U.S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma,* 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt* v. *Baird,* 405 U.S. at 453-454; *id.,* at 460, 463-465 (White, J., concurring in result); family relationships, *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535 (1925), *Meyer* v. *Nebraska, supra.*"

And in *California Bankers Assn.* v. *Shultz,* 416 U.S. 21 (1974), this Court carefully delineated the limitations on governmental intrusion into the zone of privacy. In *Shultz,* several individual bank customers (the "depositor plaintiffs"), banks (the "bank plaintiffs") and others contended that the delegation to the Secretary of the Treasury under the Bank Secrecy Act of broad authority to require reports of domestic monetary transactions from the financial institutions and parties involved was an unconstitutional invasion of privacy. Noting that despite the broad authority granted to the Secretary of the Treasury, the implementing regulations thereunder required only that the financial institution file a report on each domestic transaction in currency of more than $10,000 (31 C.F.R. §103.22), this Court held that the Act, as implemented by the regulations did not unconstitutionally invade the bank plaintiffs' privacy (416 U.S. at 63-7). The Court did not reach the question whether the depositor plaintiffs' privacy had been unconstitutionally infringed because there had been "no allegation by any of the individual depositors that they were engaged in the type of $10,000 domestic currency transaction which would necessitate that their bank report it to the government" (416 U.S. at 68).

The concurring opinion of Mr. Justice Powell, with whom Mr. Justice Blackmun joined, made it clear that a majority of this Court (the two concurring and three dissenting justices*) would not have sanctioned the automatic produc-

* Justices Douglas and Marshall dissented in *Shultz* on the grounds, *inter alia,* that the domestic reporting provisions of the Bank Secrecy Act, even as narrowed by the regulations, constituted an invasion of privacy (see Douglas, J. at 416 U.S. at 87-91 and Marshall, J. at 93-99). Although concurring with part of Justice Douglas' dissent, Justice Brennan based his dissent on the contention that the Act constituted an impermissible delegation of authority to the Secretary of the Treasury. He did not concur with the portion of Justice Douglas' opinion cited above (which relates to the reporting requirements of the Bank Secrecy Act) because, in light of his views on delegation, he could "see no need to address the independent constitutional objections the plaintiffs below attempt to raise" (416 U.S. at 91). However, Justice Brennan did concur with the portions of Justice Douglas' opinion holding that the record keeping requirements also violated the constitutional right of privacy (Douglas, J. at 416 U.S. at 79-86). Also, Justice Brennan found that "the reporting provisions are inseparable from—and in some cases considerably broader than—the record keeping requirements." Accordingly, we submit that it is fairly inferable that, at a minimum, Justice Brennan agreed with the concurring Justices that reporting requirements exceeding those embodied in the regulations promulgated under the Bank Secrecy Act would pose substantial and difficult constitutional questions.

In *Burrows* v. *Superior Court of San Bernadino County,* 13 Cal. 3d 238, 246, 529 P.2d 590, 595, 118 Cal. Reptr. 166, 172 (1974), the California Supreme Court also concluded that the true meaning of *Shultz* was that this Court will not uphold massive reporting requirements such as authorized but not implemented under the Bank Secrecy Act.

tion of large volumes of personal records without a summons or subpoena and without any showing of particularized need therefor. The concurring opinion stated (416 U.S. at 78-9):

> "The Act confers broad authority on the Secretary to require reports of domestic monetary transactions from the financial institutions and parties involved. 31 U.S.C. §§1081 and 1082. The implementing regulations, however, require only that the financial institution 'file a report on each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a *transaction in currency of more than $10,000.*' 31 CFR §103.22 (italics added). As the Court properly recognizes, we must analyze plaintiffs' contentions in the context of the Act as narrowed by the regulations. *Ante,* at 64. From this perspective, I agree that the regulations do not constitute an impermissible infringement of any constitutional right.
>
> "A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. *In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs.* Financial transactions can reveal much about a person's activities, associations, and beliefs. *At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process.* In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate. *United States* v. *U.S. District Court,* 407 U.S. 297, 316-317 (1972). As the issues are presently framed, however, I am in accord with the Court's disposition of the matter." (Emphasis in second quoted paragraph added.)

See also the dissenting opinions of Justices Douglas, Brennan and Marshall (416 U.S. at 79-99).

Thus, a majority of this Court has indicated that a broad requirement of production of documents that "touch upon intimate areas of an individual's personal affairs" pursuant to a legislative scheme "which permits access to this information without invocation of the judicial process" would unconstitutionally invade the individual's privacy.

Recent decisions cited by the State, *Fisher* v. *United States*——U.S.——, 96 S.Ct. 1569 (1976), and *United States* v. *Miller,*——U.S.——, 96 S.Ct. 1619 (1976) (Appellant's Br., p. 20) do not, we submit, affect the foregoing conclusion. *Fisher* upheld a subpoena requiring production of specific records of a designated taxpayer in connection with an investigation by the Internal Revenue service. *Miller* upheld a subpoena of bank records relating to one individual who was the subject of a criminal investigation. Thus, *Fisher* and *Miller* present a striking contrast to the present statute: (1) no massive production was required, merely records relating to the activities of a particular individual under investigation; (2) the documents were not "intimate" in the same sense as documents relating to treatment of an individual's health problems; and (3) in each case, the propriety of the demand was subject to review by the courts.

B. The Invasion of Privacy By the Challenged Provisions.

This Court has held that the right of privacy exists wherever an individual may harbor a reasonable expectation of privacy. For example, in *Terry* v. *Ohio,* 392 U.S.

1 (1968), the Court, while upholding Ohio's stop and frisk law, stated (392 U.S. at 9):

> "We have recently held that 'the Fourth Amendment protects people, not places,' *Katz* v. *United States,* 389 U.S. 347, 351 (1967), and *wherever an individual may harbor a reasonable 'expectation of privacy,' id.,* at 361 (Mr. Justice Harlan, concurring), *he is entitled to be free from unreasonable governmental intrusion.* Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For 'what the Constitution forbids . . . not all searches and seizures, but unreasonable searches and seizures.' *Elkins* v. *United States,* 364 U.S. 206, 222 (1960). Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland." (Emphasis supplied.)

We submit that where, as here, the statute calls for intimate information pursuant to a statutory scheme which does not allow for invocation of the judicial process, legitimate expectations of privacy are plainly violated.

1. The Statute Sanctions Invasion Into "Intimate Areas of an Individual's Personal Affairs."

In reversing the order of dismissal of the District Court herein and directing that a three-judge court be convened, Judge Friendly, speaking for the Second Circuit, highlighted the intimate nature of the area involved herein (480 F.2d at 108, n. 7; 51a):

> "While the State correctly points out that the prescription form does not require a description of the illness, plaintiffs counter that, at least for some of the drugs in Schedule II, many members of the public know the ailments for which such drugs are commonly prescribed. To take perhaps the most obvious example, most informed people would associate large dosages of Demerol with an ailment causing serious pain. It is immaterial that the ailment usually is not one that should arouse any emotion toward the victim save sympathy; most people simply do not want their ailments to be generally known."

At the trial of this action, several patients indicated that the prospect of having their illnesses "generally known" by having them on file at a centralized state agency caused them acute discomfort and embarrassment. A post-operative cancer patient receiving Percodan to relieve his pain, first tried non-Schedule II drugs as substitutes (196a) and when they did not yield satisfactory results, he obtained the required medicine in New Jersey where the information would not be put on a state-run computer (197a). Another plaintiff, disregarding her doctor's advice, would not permit her son, who suffered from hyperkinesis, to continue receiving prescriptions for the Schedule II drug Ritalin after she learned that the prescription therefor, containing his identity, would be placed on the State's computer in Albany (170a-172a). Similarly, it hardly seems necessary to suggest that patients who suffer from ocular gyro-crises (involuntary upward rolling of the eyes) (137a, 158a-159a) are distraught at the prospect of the centralized and easy access to information about their treatment. And all the other patient plaintiffs made it unmistakably clear that they "simply do not want" information describing prescriptions which they or their children are required to take for entirely legitimate medical reasons to be filed with and computerized by the State (114a-137a, 137a-139a, 140-145a, 211a-212a).*

* For example, Mr. Moe testified that several physicians had advised him and his wife that their son "would have to take something like Ritalin for him to have any hope of having a normal childhood and learning" (116a) and his fear that "by the time my boy is an active citizen, there will be a long file on him in a narcotics or dangerous drug context, in which somebody can get a printout and use it, once they have it, for whatever they use it for" (123a).

The result of the State's intrusion into the privacy of the doctor-patient relationship is poignantly demonstrated by the experiences of various doctors who testified in the present case. Plaintiff Matthew Brody, a psychiatrist and neurologist, found that all his patients who received Schedule II drugs were shocked and hurt when they learned of the filing requirements (154a). And Dr. Brody had to terminate treatment of patients suffering from schizo-affective disorders by use of Schedule II drugs (158a) because, even though such drugs were medically indicated and highly beneficial for such patients, the suspicion created by the filing requirement endangered the physician-patient relationship (154a-155a, 168a-169a). Other physicians found that several of their patients refused to continue using Schedule II drugs when they learned of the filing requirements (180a-181a, 186a-187a, 213a-214a). For example, Dr. Fishman, a witness, testified that the son of an elderly patient of his insisted that his mother no longer receive a Schedule II drug because of the filing requirement and that, thereafter, the patient had an immediate and prompt weight gain, her blood pressure went back up and she became bed-ridden (177a-180a). And Dr. Lustig, a plaintiff in the *Patient* action, testified that he refused to prescribe Schedule II drugs, even to relieve pain after surgery, because of the filing requirement (204a-208a).

Such physician and patient reactions are not unique. Dr. Jerry Rosenberg, a highly qualified psychologist and author who has studied the impact on the individual resulting from the accumulation of personal data about such individual (234a-240a), testified to reactions that would result from the accumulation of this data, including increased incidence of conforming behavior, withdrawal, lowered productivity, fear of or antagonism toward government and even, under some circumstances, physical symptoms (240a-252a). He concluded that there is some negative psychological impact on every person who knows that a triplicate prescription concerning drugs that he or his family is taking is being filed in Albany (252a-253a) and that such negative impact is likely to be greater where it occurs in a stressful situation, such as a sick patient seeking advice from a physician (254a-255a).

In addition to the "individual's interest in keeping to himself the existence of his physical ailments and his doctor's prescriptions for them" noted by Judge Friendly (*Roe* v. *Ingraham, supra,* at 108; 51a), the foregoing evidence demonstrates the direct infringement of two other aspects of the right of privacy: the patient's "right to receive medical care in accordance with her licensed physician's best judgment" (*Doe* v. *Bolton, supra,* at 197) and "the physician's right to practice" (*id.*, at 199).

The uncontradicted evidence herein reveals numerous instances where physicans did not prescribe medically indicated medications for their patients solely because of non-medical considerations such as the effect of knowledge of the filing requirement on the physican-patient relationship (154a-155a, 158a, 177a-180a, 180a-181a, 186a-187a, 204a-208a, 213a-214a). Indeed, the legislative history shows that a principal reason for requiring the filing of triplicate prescriptions containing patient names was the frank intention of the statutory draftsman to discourage alleged "over-prescribing" of Schedule II drugs (Ex. 32, p. 21; Ex. 33, p. 2) even while recognizing their medical utility (Ex. 32, pp. 13, 61, 81-82). And the State urges to this Court that the statute thereby achieves a "prophylactic effect" against "[b]ogus patients and unscrupulous doctors." As shown below, the evidence demonstrates no effect whatever on "bogus patients" (see *infra,* pp. 42-46).

And as to "unscrupulous doctors", we submit that disclosure of patients' names* is not a proper means to discourage prescription of the drugs. As this Court stated in *Doe* v. *Bolton* 410 U.S. 179 (1973) when it invalidated a Georgia statute requiring two-doctor concurrence prior to an abortion (*supra,* at 199):

> "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure or deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice."

Justice Douglas made the same point in his concurring opinion (410 U.S. at 219):

> "The State licenses a physician. If he is derelict or faithless, the procedures available to punish him or to deprive him of his license are well known. He is entitled to procedural due process before professional disciplinary sanctions may be imposed. See *In re Ruffalo,* 390 U.S. 544. Crucial here, however, is state-imposed control over the medical decision whether pregenancy should be interrupted. The good-faith decision of the patient's chosen physician is overridden and the final decision passed on to others in whose selection, the patient has no part. This is a total destruction of the right of privacy betwen physician and patient and the intimacy of relation which that entails."

Similarly, in this case, the legislative intention to discourage prescription of certain drugs has no rational con-

* The statute provides for (and we have no objection to) disclosure of physicians' names and the amounts of Schedule II drugs they prescribe (§ 3332(2)), which, in any event, appears to be a far more effective and direct way to apprehend physicians who overprescribe (see also pp. 45-6, *infra*).

nection with a patient's needs. Disclosure of the patient's identity entails "destruction of the right of privacy between physician and patient." Legislation requiring the filing of each and every prescription for Schedule II drugs unduly infringes the patient's right to receive treatment and the physician's right to practice. If a physician is derelict or faithless in prescribing drugs, the procedures available to punish him or to deprive him of his license are well known. This Court held in both the *Doe* and *Roe* cases that remedies of professional censure or deprivation of the physician's license are fully adequate to situations where a physician abuses his trust.

2. *The Challenged Legislative Scheme Does Not Allow for "Invocation of the Judicial Process."*

While an individual has no recognizable right of privacy merely because a government agency by summons or subpoena requires the production of personal records, we submit that the right to privacy does come into play where the State requires the automatic production of such records relating to a large number of persons without summons or subpoena and without any showing of need for the patients' identities. *California Bankers Assn.* v. *Shultz, supra; United States* v. *Stanack Sales Co.,* 387 F.2d 849 (3d Cir. 1968).

In *California Bankers Assn., supra,* three dissenting and two concurring justices indicated that regulations requiring reports by financial institutions and persons participating in domestic financial transactions of all transactions in currency or any monetary instruments—large or small—by all persons engaging in such transactions would violate the constitutional right of privacy, notwithstanding the absence of any privilege for communications between banks and their customers, because bank customers have a reasonable expectation of privacy concerning details of their financial affairs (see, *supra,* pp. 16-19).

Justice Harlan stated his understanding in *Katz* v. *United States*, 389 U.S. 347, 361 (1967), concerning what is meant by privacy as follows:

> "My understanding of the rule . . . is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable'."

Clearly, a patient has more reason to expect privacy concerning details of his health than does a bank customer with respect to details of his financial transactions (*California Bankers Assn.* v. *Schultz, supra*) or a drug packager with respect to the records of his business (*United States* v. *Stanack Sales, supra*). The necessity for protection against dissemination of computerized information has been recognized by Congress (see e.g., The Privacy Act of 1974, 5 U.S.C. § 552a (1974)). The privilege for physician-patient communications is old and well established (see 8 Wigmore on Evidence § 2380 et seq. [McNaughton Rev. 1961]) and protects the peculiarly confidential nature of the relationship upon which the present Act encroaches.

As Justice Douglas stated in concurrence in *Roe* v. *Wade* and *Doe* v. *Bolton* (410 U.S. at 219): "The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relation."

Plaintiffs herein do not contend that the retention by a pharmacist of a copy of a prescription for a statutory period such as five years is an unreasonable diminution of their expectation of privacy. Plaintiffs neither concede nor reach the question whether prior New York State law (which apparently permitted a state investigator to obtain access to such documents without a warrant) was constitutional.*

* As indicated by *California Bankers Assn.* v. *Shultz, supra*, *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), *See* v. *City of Seattle*, 387 U..S 541 (1967), *Collonade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), and *United States* v. *Bissell*, 406 U.S. 311 (1972), this is a substantial and difficult question.

But we do submit that there is a world of difference between permitting an inspector access to records in the course of an investigation and requiring all pharmacies and doctors to turn over all such information *automatically* to the State. The old system was, by its very nature, a guarantee of reasonable privacy. The automatic collection of vast volumes of personal data by a centralized state agency obviously creates a far greater likelihood of invasion of privacy.

Appellant has characterized the three judge court's legitimate concern that constitutional rights not be compromised on the grounds of administrative efficiency (J.S. 12a; 403 F. Supp. at 937-938) as "judicial Luddism" (Appellant's Br., p. 30). Yet Courts have protected constitutional rights, where they were found to apply, despite the clear prospect of increased administrative inconvenience and burden. See e.g., *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *Id.*, at 41-44 (Burger, C.J. concurring); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Population Services International* v. *Wilson*, 398 F. Supp. 321, 335 (S.D.N.Y. 1975) *prob. juris. noted sub nom., Carey* v. *Population Services International*, 44 L.W. 3162 (Sept. 20, 1975); *Almenares* v. *Wyman*, 334 F. Supp. 512 (S.D.N.Y.), *aff'd as modified* 453 F.2d 1075 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972).

The Act presently under consideration, unlike the Bank Secrecy Act, is "self-executing" (cf. 416 U.S. at 64). Not even a request by a state agent is needed. Unlike *Shultz*, where the Act became effective only after the Secretary of the Treasury promulgated regulations, no regulations to implement the reporting requirements of Article 33 need be promulgated by the Commissioner of Health. Also, in *Shultz*, this Court emphasized that "the legislative history of the Act clearly indicates that records which it authorized the Secretary to require [banks to keep] were to be available only by normal legal process. . . ." (416 U.S. at 54.) In sharp contrast, under the Act here challenged (1) there is no requirement that an administrative summons, sub-

poena or warrant be issued and (2) the records turned over need not be claimed to be relevant and material to a specific matter then under inquiry (3) the records inspected relate to a large number of persons and (4) the records all relate to the most intimate personal affairs.

By explicitly providing that huge volumes of personal records be turned over *automatically* by every doctor and pharmacist in the State who prescribes or dispenses Schedule II drugs, we submit that the Act clearly infringes the constitutional right of privacy.

POINT II

Because the Right of Privacy Is Fundamental, a "Compelling State Interest" Should Be Shown Before a State Invasion of Privacy Is Permitted.

This Court has consistently recognized that the right of privacy, "the most comprehensive of rights and the right most valued by civilized men" (*Olmstead* v. *United States,* 277 U.S. 438, 478 [1928] Brandeis, J. dissenting), is a "fundamental [right] implicit in the concept of ordered liberty" (*Roe* v. *Wade, supra,* at 152 quoting *Palko* v. *Connecticut,* 302 U.S. 319, 375 (1937)). Accord, *Paul* v. *Davis,* —— U.S. ——, 96 S.Ct., 1155, 1166 (1976). A heavy burden should therefore be placed on a state seeking to justify statutory intrusion into constitutionally protected zones of privacy. This burden has most frequently been articulated as a requirement that the statute in question be justified by a "compelling state interest."*

* The State argues at one point (Appellant's Br., p. 12) for the existence of "an almost absolute [state] right to control the sale, prescription and use of dangerous drugs" citing *Whipple* v. *Martinson,* 256 U.S. 41 (1921) and *Robinson* v. *California,* 370 U.S. 660 (1962). However the *Robinson* case itself makes clear that no such "absolute" right exists. In that case, this Court held that California's attempt to control the problem of narcotics addiction by making such addiction a criminal offense violated the Eighth and Fourteenth Amendments to the Constitution. See also *United States* v. *Rivera-Marquez,* 519 F.2d 1227, 1228-1229 (9th Cir.) cert. denied, —— U.S. ——, 96 S.Ct. 369 (1975).

Thus in *Roe* v. *Wade, supra,* this Court in discussing the burden on a state seeking to justify a statute invading the right to privacy stated (410 U.S. at 155-6):

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' *Kramer* v. *Union Free School District,* 395 U.S. 621, 627 (1969); *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969); *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold* v. *Connecticut,* 381 U.S. at 485; *Aptheker* v. *Secretary of State,* 378 U.S. 500, 508 (1964); *Cantwell* v. *Connecticut,* 310 U.S. 296, 307-308 (1940); see *Eisenstadt* v. *Baird,* 405 U.S. at 460, 463-464 (White, J., concurring in result).
>
> "In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physican and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable."

See also *Buckley* v. *Valeo,*——U.S.——, 96 S.Ct. 612, 656-7 (1976) (describing the standard to be applied to statutes invading the right of privacy as one of "strict . . . scrutiny").

Parallel to the requirement that invasion of a constitutionally protected zone of privacy must be in the service of a fundamental state interest is the further requirement that the compelling state interest allegedly served must be grounded in fact and must not be merely conjecture on the part of state officials.

Thus in *Doe* v. *Bolton, supra,* this Court in discussing a Georgia statute requiring that abortions be performed only in an appropriately accredited hospital stated (410 U.S. at 195):

> "Appellants and various *amici* have presented us with a mass of data purporting to demonstrate that some facilities other than hospitals are entirely adequate to perform abortions if they possess these qualifications. The State, on the other hand, has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient. We feel compelled to agree with appellants that the State must show more than it has in order to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests."

Similarly in the instant case, the State's alleged interest in having patient names on centrally filed prescriptions is unsupported by any data, being mere conjecture which was contradicted by the evidence adduced at trial (Point IIIA, *infra*).

Justice Stewart noted in his concurring opinion in *Roe* v. *Wade, supra,* that the fundamental nature of the right to privacy has not been limited solely to matters of marriage and family life but has been held to include the right to send a child to private school and the right to teach a foreign language. He stated (410 U.S. at 169-170):

> "As Mr. Justice Harlan once wrote: '[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from

> unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgement must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.' *Poe* v. *Ullman,* 367 U.S. 497, 543 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter 'Great concepts like . . . "liberty" . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.' *National Mutual Ins. Co.* v. *Tidewater Transfer Co.,* 337 U.S. 582, 646 (dissenting opinion).
>
> "Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Loving* v. *Virginia,* 388 U.S. 1, 12; *Griswold* v. *Connecticut, supra; Pierce* v. *Society of Sisters, supra; Meyer* v. *Nebraska, supra.* See also *Prince* v. *Massachusetts,* 321 U.S. 158, 166; *Skinner* v. *Oklahoma,* 316 U.S. 535, 541. As recently as last Term, in *Eisenstadt* v. *Baird,* 405 U.S. 438, 453 we recognized 'the right of the *individual,* married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. 'Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), or

> the right to teach a foreign language protected in *Meyer* v. *Nebraska,* 262 U.S. 390 (1923)'. *Abele* v. *Markle,* 351 F. Supp. 224, 227 (D.Conn. 1972)."

See also *Paul* v. *Davis,*——U.S.——, 96 S.Ct. 1155, 1166 (1976).

Judge Friendly, speaking for the Second Circuit in this case, after quoting a part of the foregoing passage, further observed (480 F.2d at 108; 51a):

> "Should the constitutionally protected zone of privacy be extended beyond the area already recognized, the individual's interest in keeping to himself the existence of his physical ailments and his doctor's prescriptions for them would lie rather close in the continuum."

We urge that this Court should recognize the threat to constitutional rights posed by personal data systems and the nature of the injury inherent in the abusive character of such systems. As one commentator has stated:

> "The Court should re-focus its conception of the fundamental right of personal privacy in light of twentieth century technology and the executive-dominated federal government. Privacy, interests in thought, self, reputation, and psychic security did not need express protection in the past because no real threat of invasion appeared to exist. Today the threat is both real and pervasive, and the Court must recognize the right 'implicit in the concept of ordered liberty.'" Note, *Right of Privacy,* 69 Nw. U. L. Rev. 263, 295 (1974).

See also S. Rep. No. 93-1183, 93rd Cong., 2d Sess. p. 4 (1974) (remarks of Senator Ervin). Well publicized Watergate-allied events as well as specific instances of abuses in New York State discussed below (*infra,* pp. 54-60) make plain the need to extend constitutional protection

to parties whose privacy has already been invaded by different forms of data collection. See also *Menard* v. *Mitchell,* 430 F.2d 486 (D.C. Cir. 1970) and on remand, 328 F. Supp. 718 (D.D.C. 1971); *Eddy* v. *Moore,* 5 Wash. App. 334, 487 P. 2d 211 (1971); *Davidson* v. *Dill,* 503 P. 2d 157 (Colo. S.C. 1972).

The development of modern methods of computerization of records, affording state investigators instant access to enormous volumes of personal information, poses a new and greater threat to privacy with which the Courts must keep pace. As the Supreme Court of California observed in *Burrows* v. *Superior Court of San Bernardino County,* 13 Cal. 3d 238, 246, 529 P. 2d 590, 593, 118 Cal. Reptr. 166, 172 (1974):

> "Cases are legion that condemn violent searches and invasions of an individual's right to the privacy of his dwelling. The imposition upon privacy, although perhaps not so dramatic, may be equally devastating when other methods are employed. Development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices.[4]"

"4. In 1890, Samuel Warren and Louis Brandeis, in their celebrated article, The Right to Privacy (4 Harv.L. Rev. 193, 195) foresaw this problem. They wrote: 'Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' (Fn. omitted.)"

See also, *Drake* v. *Covington County Bd. of Educ.*, 371 F. Supp. 974, 979 (M.D. Ala. 1974) (Absent any compelling state interest, the cancellation of an unmarried, pregnant teacher's employment contract for immorality violated the teacher's right of privacy, when the board of education based its action on evidence obtained from the teacher's physician); *Merriken* v. *Cressman,* 364 F. Supp. 913 (E.D. Pa. 1973) (A preventive drug abuse program which was designed to aid a school district in identifying potential drug abusers through the use of "family-life" oriented questionnaires was held to violate students' and parents' rights to privacy); *In re Lifschutz,* 85 Cal. Rptr. 829, 497 P. 2d 557, 567-568 (Cal. Sup. Ct. 1970) (Under certain circumstances, confidentiality of a psychotherapeutic session would fall within the zone of constitutionally protected privacy); *Town of Huntington* v. *N.Y. State Drug Abuse Control Comm.,* 84 Misc. 2d 138, 145-148, 373 N.Y.S. 2d 728, 736-739 (Sup. Ct. Nas. Co. 1975); Boyer, *Computerized Medical Records and the Right to Privacy: The Emerging Federal Response,* 25 Buffalo L. Rev. 37, 87-89 (1975).

We urge that in the instant case this Court recognize the threat to the individual's privacy created by the enormously enhanced capabilities for a storage and retrieval of information created by the computer. When *Olmstead* v. *United States,* 277 U.S. 438 (1928) was decided, this Court could not accept that an invasion of privacy had taken place by wiretapping because no physical thing had been taken and no physical space had been penetrated. However, subsequently in *Katz* v. *United States,* 389 U.S. 347, 352 (1967), this Court rejected ancient requirements of trespass and held that the defendant therein, as a user of a pay telephone, had a right to expect "that the words he uttered into the mouthpiece . . . [would] not be broadcast to the world." Similarly, the Court should recognize that the concept of ordered liberty in a modern society implies

a right of privacy to be protected against government collection and storage of massive volumes of personal data of the type involved in this case. See *Roe* v. *Ingraham,* 364 F. Supp. at 543; J. S. 12a; Note, *Right of Privacy,* 69 Nw. U. L. Rev 263, 292-293 (1974).

We submit that the privacy interests involved in the instant case are fundamental to the concept of ordered liberty and, accordingly, that the "compelling state interest" test should be applied rather than the "rational basis" test advocated by the appellant (brief at 21-26). We know of no authority for the application of "middle level security" to the instant statute except in so far as the concept of "middle level scrutiny" is referrable to the requirement discussed above that the compelling state interest allegedly served "have substantial basis in actuality, not merely in conjecture." (Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 21 (1972)). See generally Note, *The Right to Privacy,* 50 N.Y.U. L. Rev. 1149 (1976).

The State raises the spectre of *Lochner* v. *New York,* 198 U.S. 45 (1905), arguing that affirmance of the decision of the court below "would be a revival of substantive due process" (Appellant's Br. at 10). The argument has been fully answered in this Court, *Roe* v. *Wade, supra,* at 167 (Stewart, J. concurring) and at 212 n. 4 (Douglas, J. concurring). And, as Professor Gunther has pointed out, relying on Justice Holmes' dissent in *Lochner,* "the primary evil of the discredited [*Lochner*] doctrine was the dogmatic judicial intervention regarding ends, not means." Gunther, *supra,* at 42. Appellees concede that control of dangerous drugs is a legitimate end of state legislation. However, a state may not massively intrude into the private lives of individuals in the name of drug control, where no relationship between such intrusions and the concededly legitimate state goal can be demonstrated.

The state further speculates that affirmance may "jeopardize" other statutes. (Appellant's Br., pp. 17, 38-39.) It is submitted that affirmance would no more jeopardize these statutes than have the opinions of this Court in the *Roe* and *Doe* cases, *supra, Griswold* v. *Connecticut,* 381 U.S. 479 (1965) and *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972). It may well be that some aspects of the physician-patient relationship are constitutionally protected, while others are not. See, e.g. *In re Lifschutz, supra.* Thus the reasonableness of the expectation of privacy in reporting a gunshot wound to a physician may be quite different from the reasonableness of the expectation of a patient receiving a prescription drug for legitimate medical reasons. See also Boyer, *supra,* at 87-88 (1975).

This Court is not faced with the cases hypothesized by the state. We submit that for the great majority of people, records of the type involved in this case are the most sensitive kinds of personal information that will ever be collected* and that before the government is permitted to store such intimate data as to citizens who have done nothing wrong except to fall ill, it should be required to demonstrate a compelling state interest.

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* The three-judge court herein stated:

> "An individual's physicial ills and disabilities, the medication he takes, the frequency of his medical consultation are among the most sensitive of personal and psychological sensibilities. One does not normally expect to be required to have to reveal to a government source, at least in our society, these facets of one's life. Indeed, generally one is wont to feel that this is nobody's business but his doctor's and his pharmacist's." (J. S. 10a; 403 F. Supp. at 937).

POINT III

Under Either the Compelling State Interest Test or the Rational Relationship Test, the Statute's Consitutionality Cannot Be Sustained.

A. The Absence of Any Need for the Challenged Provisions.

The Court of Appeals herein found that the "most important" justification proffered by the State in support of the centralized filing requirement was that the State needed the names of parties receiving Schedule II drugs to detect four types of abuses. Thus, the Court of Appeals stated (480 F.2d at 108; 52a-53a):

> "New York has advanced powerful arguments in support of the requirement of central filing of prescriptions for Schedule II drugs. The *most important* are that only by such filing, now complemented by the computer's ability to answer appropriate inquiries, can the State readily detect a number of serious abuses—the same patient going from doctor to doctor and thereby obtaining quantities of Schedule II drugs greater than his legitimate medical needs; overprescription by doctors; and the theft or forgery of prescriptions." (Emphasis added.)

The three-judge court, at the time of plaintiffs' motion for a preliminary injunction, held that the issue of need for the patient's name and address on the filed prescription form was the "critical question" of this case and directed plaintiffs to "submit the necessary intensive and detailed analysis of the competing interests of the state and the individual", including specifically a demonstration "that the computerization of names is not necessary for the accomplishment of the state's goals" (364 F.Supp. at 546; 76a).

Not only did plaintiffs submit such an analysis (see *supra,* pp. 6-8 and *infra,* pp. 39-53), but the State withdrew the argument (previously cited to the Court of Appeals as the *raison d'etre* for the challenged provisions) that patients' names are required to detect the four alleged "abuses" cited by the Court of Appeals. Thus, allegations that the patient-identification provisions are needed to detect "over-prescriptions", "thefts", and "forgeries" were not urged to the Court below. The State conceded to the Court below that it did *not* need patients' names to solve any of those problems (see testimony cited, *infra,* at p. 43) and *stipulated* that the only need for patients' names is to counteract the so-called "doctor to doctor" problem alluded to by the Court of Appeals (95a, par. 12).

Appellant's present brief does not cite any evidence whatever of the supposed abuse of "the same patient going from doctor to doctor and thereby obtaining quantities of Schedule II drugs greater than his legitimate medical needs" (480 F.2d at 108; 52a). Instead, appellant resorts to alleged facts solely in his possession and verifiable solely by him.* We submit that such "facts", which are no part of the record of this case, never referred to in response to plaintiffs' discovery requests or testified to by defendant's witnesses or subjected to cross-examination and never cited to the Court below, are entitled to no weight whatever.

As was stated by this Court in *Schley* v. *Pullman Car Co.,* 120 U.S. 575, 578 (1887):

> "[T]he defendant in error states many things [in his brief], which he declares to be 'incontrovertible facts' . . . which are wholly unsustained by anything in the record. . . . The excuse given for this breach of professional propriety is 'the extreme brevity of the record.' . . . The excuse given furnishes no apology whatever for his violation of the terms of the stipulation; much less does it palliate his attempt to influence the decision here, by reference to matters not in the record, and which, he must have known, could not be taken into consideration. It is only necessary to say that the facts, *dehors* the record, which have been improperly introduced into the brief of the counsel for the defendant in error, have not in any degree influenced our determination of the case."

* Among the "facts" in appellant's brief which are totally unsupported by the record are those in note (*) at 9, notes (*) and (***) at 27; note (*) at 29; note (*) at 30; and note (*) at 37.

Accord, *Thomson* v. *Gaskill,* 315 U.S. 442, 446 (1942); *Smith* v. *United States,* 343 F.2d 539, 541 (5th Cir. 1965), *cert. denied* 382 U.S. 861 (1965); *Walters* v. *Chicago and North Western Ry. Corp.,* 216 F.2d 332, 336 (7th Cir. 1954); *Bono* v. *United States,* 113 F.2d 724, 725 (2d Cir. 1940).

Indeed, the principal "justification" proferred by the State is a reference to "45 instances or referrals of over-prescription *and/or* multiple sources (doctor to doctor shopping)" (Appellant's Br., pp. 27-28, fn, emphasis added). Obviously, the word "and/or" conceals the salient facts. It has always been recognized that the patient's name is not necessary to detect over-prescriptions because the practitioner himself sets forth maximum daily dosage on the prescription together with the total quantity prescribed (29a). Consequently over-prescriptions can be ascertained without the patient's name either (a) by dividing the total prescribed by the maximum daily dosage to see whether an amount for more than 30 days has been prescribed or (b) by comparing the amounts prescribed with standard prescriptions. In neither case is the patient's name necessary or even useful. In any event, if an investigation of the particular patient were required, the patient's name could be obtained directly from the doctor or pharmacy, both of which are identified on the prescription (29a).

More important, the uncontradicted record proof is that "doctor to doctor" cases were utterly insignificant prior to 1973 (3 cases reported in 4 years) and have continued to be *de minimis* since institution of the present system (2 case reports, with no convictions or arrests based thereon) (see *supra,* pp. 6-8; *infra,* pp. 43-45).

The plain fact is that there never has been a "doctor to doctor" problem. Notwithstanding defendant's assertion that "much study" was given to this "legislation" (Appellant's Br., p. 46), the entire "legislative history" supporting the existence of a "doctor to doctor" problem consists of one passing reference in the Second Interim Report (Ex. 32, p. 21). No testimony has been cited from the legislative history or elsewhere where the matter was even discussed. No statistics as to the extent of such an alleged problem have ever been adduced. There is, in short, not a scintilla of evidence that such a problem has ever existed.

In support of the foregoing statements, we turn now to a detailed review of the legislative history, the evidence in this case and similar statutes in other states and the federal government, all of which demonstrate the complete absence of any legitimate purpose for the challenged provisions.

1. The Legislative History of Article 33 Provides No Rationale As to a "Need" for Patients' Names.

The purpose of Article 33 was stated by Governor Rockefeller at the time of its enactment on June 8, 1972 to be to "help reduce the diversion of potentially dangerous drugs from legal, medical and research uses into illegal channels" (Governor's Memorandum on approving L. 1972 cc. 878 to 881, 2 McKinney's 1972 Session Laws of N. Y., at p. 3407).

Assemblyman Chester A. Hardt, Chairman of the Temporary State Commission to Evaluate the Drug Laws, made

the same point with respect to triplicate prescriptions. In his memorandum to members of the legislature prior to the bill's enactment, he stated that "the triplicate prescription provision is but one facet of the comprehensive system of control against diversion of lawfully manufactured, distributed, prescribed and dispensed psychoactive drugs. . . ." (Ex. 33, p. 1.)

However, the legislative history shows that no consideration whatever was given to the question whether the patient's name is required on the copy of the triplicate prescription form filed in Albany (See Ex. 31-33).* In the rare instances where the triplicate prescription provisions were discussed (principally the Hardt Memorandum [Ex. 33] and the Second Interim Report [Ex. 32] at pp. 21-22), the discussion consisted of generalized and unsupported claims that they will assist in enforcement of the Act, such as this paragraph from the Second Interim Report (Ex. 32, p. 21):

> "Once, the department has received the copies, it will be able to compile data which will uncover irregularities such as forgeries, fraudulent obtaining of schedule II substances, and thefts of prescription blanks and their misuse by unauthorized persons. The information received by the department will show if a patient has obtained prescriptions by going from doctor to doctor, or if stolen prescriptions are being used. This procedure will also indicate whether there has been an over-prescribing or over-dispensing of Schedule II drugs."

The evidence in this case, as detailed below, shows that such claims are baseless; that over-prescription, over-dispensing of drugs and abuses resulting from thefts and forgeries of prescription blanks can all be detected equally

* It was stipulated that three reports (Ex. 31-33) constitute the entire legislative history of the Act for purposes of this case (81a-82a).

well without computerization of patient's names; and that the sole remaining abuse cited, the obtaining of illicit amounts of drugs by going from "doctor to doctor" is minimal. These facts were not considered by the legislature. Indeed, the legislative history of the challenged provisions reveals that the drafters of the Act never considered *any* of the following questions: whether accomplishment of the foregoing objectives could be achieved equally well without the patient's name; whether the patient's identity is actually required in any instance; and, if so, whether the abuse cited is sufficiently wide-spread to warrant the collection of data on 125,000 patients per month or 1.5 million prescriptions containing patients' names per year.

The answers to these questions (as contained in the evidence in this case) demonstrate the complete absence of any need for patients' names.

2. *The Experience of the Department of Health Demonstrates That There Is No Need for Patients' Names on the Filed Prescriptions.*

Although the Second Interim Report cited numerous "irregularities" which would be "uncovered" by triplicate prescriptions (see Ex. 32, p. 21 quoted *supra*, pp. 39-40), the State conceded that the name on the prescription is of use to the State in only one instance: in detecting cases of persons who have gone "from doctor to doctor" to obtain excessive amounts of a Schedule II drug. Moreover, the patient's name is only of use if, in going from doctor to doctor, the patient uses the same name.* Thus, the State stipulated as follows (95a, par. 12):

* The *Amicus* brief of the State of California confirms that the "doctor to doctor" problem was the only conceivable purpose for the patient identification provisions (Cal. *Amicus* Br., p. 8). Thus, the first hypothetical given therein is that "a patient without using an

(*footnote continued on following page*)

> "The only information from the computer which Dr. Baker contemplates would contain the names of any patients is a print-out of patients who have obtained more than a 30-day supply of a Schedule II drug in a 30-day period. The only reason given by Dr. Baker for the above print-out is that it will assist in the identification and investigation of persons who, *using the same name*, go from doctor to doctor to obtain an illicit supply of Schedule II drugs." (Emphasis added.)

Dr. Arthur G. Baker, Associate Commissioner of the New York State Department of Health and the person charged with over-all responsibility for the triplicate prescription program, so testified in this case (Ex. 37, p. 139):

> "Q. Really we come back to what we said before, and that is the only reason why you have requested that the patient's name be put on the computer is to detect patients who go from doctor to doctor in order to obtain an excessive amount of a particular drug.
>
> A. That's correct."

Dr. Baker also admitted that patients' names on the computer would not assist in detecting forgeries or raised prescriptions or thefts because the patient information on such prescriptions would be incorrect anyway (Ex. 37, pp. 118-21, 126-29).

Nor has there ever been any indication in the Department of Health that the problem of persons going from

(*footnote continued from preceding page*)

alias could go from doctor to doctor to obtain Schedule II drugs" (*id.*). The other hypotheticals suggested—prescriptions to "an addict or habitual user" or to persons "using fictitious names" (*id.*) have no application to this case. The New York statute (§3331(1)) provides that Title IV (which includes the filing requirements at issue herein) does not apply to the prescribing or dispensing of controlled substances to an addict or habitual user. And, as noted above, it has been conceded by the State of New York that computerization of fictitious names is of no aid in enforcement of the statute (see 95a, par. 12 and testimony of Dr. Baker in Ex. 37 at 118-20).

"doctor to doctor" was serious or widespread. On November 15, 1974, the State also stipulated that from January 1, 1969 to May 12, 1974, there had been only four case reports of "doctor to doctor" type violations (95a, par. 12), distributed as follows:

1974	1 case
1973	None
1972	None
1971	1 case
1970	1 case
1969	1 case

Although Defendant's Trial Memorandum stated that Mr. Cannizzaro would testify "that the computer indicates that there are hundreds of persons, using the same name, receiving Schedule II drugs from more than one doctor, i.e., shopping" (Deft's Trial Memo., p. 10), there was in fact no such testimony and no evidence that additional cases of patients going from doctor to doctor were referred to BNC. On the contrary, Cannizzaro testified that he had no knowledge of a single prosecution or arrest of a person shown by the computer to have obtained an illicit supply of Schedule II drugs by going "from doctor to doctor" (443a-444a).

Indeed, the Department of Health, from the outset, evidenced a monumental unconcern about the allegedly serious "doctor to doctor" problem. Although the Act was approved on June 8, 1972 and became effective on April 1, 1973, there was no memorandum which suggested that the computer might assist in solving the "doctor to doctor" problem until October 23, 1973 and even then the problem was not included in those to be answered on a "first priority basis" (93a-94a, par. 10). Similarly, when Dr. Baker testified in this case on February 11, 1974, he was not aware of any "doctor to doctor" investigations then in progress (Ex. 37,

pp. 97-8) and he had no knowledge that any such problem existed in New York State (Ex. 37, pp. 68-69).

And Assemblyman Hardt, in stating the principal purposes of the triplicate prescription provisions, did not even mention the spurious "doctor to doctor" issue (Ex. 33, p. 4):

> "At regular intervals, certain specific questions will be asked of the computer. These questions will be formulated at the highest administrative level and no question may be asked of the computer that has not been previously approved by the Department. The questions will relate to physicians who have prescribed and dispensed a greater amount of a Schedule II substance than could possibly be justified by the nature of their practice. The computer will also be asked to report on situations arising from lost or stolen prescriptions.

The questions which Assemblyman Hardt suggested be answered by computerized information (and more) can, and are, being answered without reference to the names of the patients involved. *First,* the computerization authorized by the law, even without patients' names, clearly enables the State to spot the over-prescribing physicians who concerned Assemblyman Hardt. Printouts now being produced by the system enable the Department of Health to ascertain the average amounts of each Schedule II controlled substance that is prescribed per physician (Ex. 14) and enable the State to go directly to those doctors who prescribe substantially more than the average to determine if there is a *bona fide* medical reason therefor (504a-507a).

Second, another printout shows lost or stolen prescription blanks which have been cashed (507a-508a).

Third, printouts showing two prescriptions with the same number and incorrect BNDD numbers for doctors help detect forgeries (Ex. 16; 510a-511a).

In addition, other printouts give the State valuable information as to the use of various drugs (Ex. 15; 508a-510a).

None of the above printouts contains patient names. None of the legitimate and beneficial purposes of Article 33 served by these printouts will be affected if this Court affirms the holding of the three-judge court that the portion of Article 33 requiring disclosure of patients' names violates the Due Process Clause of the Fourteenth Amendment. The State's assertion that elimination of the filing requirement "precludes any effective regulation" (Appellant's Br., p. 12) is frivolous.

3. *Similar Statutes of Other States and the Federal Government Further Demonstrate That Article 33 Was Not Narrowly Drawn to Meet Legitimate State Interests.*

The Federal government, the Commissioners on Uniform State Laws and the overwhelming majority of states which have considered triplicate prescription legislation have (unlike the State of New York) not found it necessary to intrude upon the privacy of the physician-patient relationship.

First, they did not find it "necessary" to require that the names of patients receiving Schedule II substances be filed with a centralized state agency.

Second, they did not find it "necessary" to require that the names of patients be turned over automatically but provided that such names may only be obtained based upon a showing of some relevance or necessity by the state agency.

Third, the states, federal government and Uniform Law have specific provisions to protect the physician-patient relationship.

We submit that the differences between the New York statute and the other statutes discussed below further

demonstrate that the challenged provisions of Article 33 are not justified by any "compelling state interest" and are not even reasonably related to the purposes of the Act in which they are found.

1. The Federal Drug Abuse Prevention and Control Act requires that all Schedule II drugs be dispensed pursuant to a prescription (21 U.S.C. §829(a)) and that the pharmacist retain a copy of the prescription for two years (21 U.S.C. §827(b)). Nowhere therein is the requirement (a) that the prescription be filed with the federal government or (b) that the identity of the patient using such drugs be furnished to the government. Indeed, even though there is no federal requirement of wholesale disclosure of the identities of patients, the Federal Act has two provisions specifically protecting the identities of those patients whose identities have been disclosed to the government (see 21 U.S.C. §§873(b) and 1175).

Moreover, the federal government has made clear that it can uncover abuses without the kind of invasion of patients' privacy the State is seeking to impose. The Bureau of Narcotics and Dangerous Drugs, in a January 1972 pamphlet to practitioners explaining the Controlled Substances Act of 1970 (21 U.S.C. §801, et seq.) stated (Informational Outline of the Controlled Substances Act of 1970, p. 8):

> "In order for the Bureau of Narcotics and Dangerous Drugs to curtail the diversion of controlled drugs, it is necessary for manufacturers, wholesalers, pharmacies, hospitals, and certain physicians, among others, to keep records of drugs purchased, distributed and dispensed. Having this closed system, a controlled drug can be traced from the time it was manufactured to the time it was dispensed to the ultimate user."

2. The Uniform Controlled Substances Act was adopted by the National Conference of Commissioners on Uniform

State Laws in August 1970. It contains no provision for the filing of prescriptions (or any other forms showing the identities of patients) with the State. On the contrary, the Uniform Act specifically maintains the confidentiality of the physician-patient relationship as follows (§ 504(c)):

> "A practitioner engaged in medical practice or research is not required or compelled to furnish the name or identity of a patient or research subject to the [appropriate person or agency], nor may he be compelled in any State or local, civil, criminal, administrative, legislative or other proceedings to furnish the name or identity of an individual that the practitioner is obligated to keep confidential."

Moreover, although §306 of the Uniform Act requires "practitioners" (defined in §101(t) thereof to include physicians and pharmacists) to maintain certain records, the Uniform Act very carefully provides that such records are only available pursuant to a warrant, except in limited special circumstances. Such circumstances are set forth in §502(b)(4)of the Uniform Act which reads as follows:

> "This Section does not prevent the inspection without a warrant of books and records pursuant to an administrative subpoena issued in accordance with [insert appropriate State Code section], nor does it prevent entries and administrative inspections, including seizures of property, without a warrant:
>
> (i) if the owner, operator, or agent in charge of the controlled premises consents;
>
> (ii) in situations presenting imminent danger to health or safety;
>
> (iii) in situations involving inspection of conveyances if there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;

> (iv) in any other exceptional or emergency circumstances where time or opportunity to apply for a warrant is lacking; or,
>
> (v) in all other situations in which a warrant is not constitutionally required."

The Comment to the above Section states:

> "The purpose of this Section is to codify certain recent United States Supreme Court decisions, in particular *Camara* v. *Municipal Court of the City and County of San Francisco,* 387 U.S. 523 (1967), *See* v. *City of Seattle,* 387 U.S. 541 (1967), and *Colonnade Catering Corp.* v. *U. S.,* 397 U.S. 72 (1970), with regard to inspection warrants.* The Section sets out in very careful terms the procedures and restrictions for obtaining and using an administrative inspection warrant. This is of vital importance to the States since they are involved in the regulation of the legitimate drug industry and must have the ability to inspect records, books and premises if access to them is denied. By having a carefully delineated code section dealing with administrative inspection warrants, law enforcement officers will be more certain of what is needed to obtain them and the courts can apply a uniform standard. Perhaps even more important, the industry being inspected will have more certainty as to its rights and obligations in this area."
>
> "* See also: *Kramer Grocery* v. *U.S.,* 294 F.Supp. 65 (1968); and *United States* v. *Stinack* [sic] *Sales Co.,* 387 F.2d 849 (1968)."

The New York statute rides roughshod over all these considerations in requiring the automatic filing of all prescriptions for Schedule II drugs without any real possibility of judicial supervision of the process.

3. Forty states and two territories of the United States, including New York, have enacted statutes based upon the

Uniform Controlled Substances Act.* In addition to New York, only three of those states, California, Idaho and Illinois, require the filing of copies of prescriptions (which contain patients' names) with a department of the state.**

In all the remaining thirty-six states and two territories Schedule II substances may be dispensed on the written

* The remaining 39 states and two territories are as follows: Alabama (Ala. Code Tit. 22 §258(25), et seq.), Arkansas (Ark. Stats., § 82-2601, et seq.), California (Cal. Health & Safety Code, §11000, et seq.), Connecticut (Conn. Gen. Stats. Ann., §19-443, et seq.), Delaware (16 Del. Code, §4701, et seq.), Florida (Fla. Stats. Ann., §398.01, et seq.), Hawaii (Hawaii Rev. Stats., §329-1, et seq.), Idaho (Idaho Code, §37-2701, et seq.), Illinois (Ill. S.H. Ann., ch. 56½, §1100, et seq.), Indiana (Indiana Code 1971, §35-24.1-1-1, et seq.), Iowa (Ia. Code Ann., §204.101, et seq.), Kansas (Kan. Stats. Ann., §65-4101, et seq.), Kentucky (Ky. Rev. Stats., §218A.010, et seq.), Louisiana (La. Stats. Ann.—Rev. Stats., §40:961, et seq.), Maryland (Md. Code Ann., Art. 27, §276, et seq.), Massachusetts (Mass. L. Ann., ch. 94C, §1, et seq.), Michigan (Mich. Comp. L. Ann., §335.301, et seq.), Minnesota (Minn. Stats. Ann., §152.01, et seq.), Mississippi (Miss. Code Ann., 1972, §41-29-101, et seq.), Missouri (V. Ann. Mo. Stats., §195.010, et seq.), Montana (R.C.M., 1947, Ann., §54-301, et seq.), Nebraska (Neb. Rev. Stats., Supp. 1971, §28-4,115, et seq.), Nevada (Nev. Rev. Stats., §453.011, et seq.), New Jersey (N.J. Stats. Ann., §24.21-1, et seq.), New Mexico (N.M. Stats. Ann., 1953, §54-11-1, et seq.), North Carolina (N.C. Gen. Stats., §90-86, et seq.), North Dakota (N.D. Cent. Code, §19-03.1-.01, et seq.), Oklahoma (63 Okla. Stats. Ann., §2-101, et seq.), Pennsylvania (35 Penn. Stats. Ann., §780-101, et seq.), South Carolina (S.C. Code, 1962, §32-1510.21, et seq.), South Dakota (S.D. Comp. L. Ann., §39-17-44, et seq.), Tennessee (Tenn. Code Ann., §52-1408, et seq.), Texas (V. Ann. Civ. St., Art. 4476-15), Utah (Utah Code Ann., 1953, §58-37-1, et seq.), Virginia (Va. Code, 1950, §54.524.1, et seq.), Washington (Rev. Code Wash. Ann., §69.50.101, et seq.), West Virginia (W.Va. Code, §60A-1-101, et seq.), Wisconsin (Wis. Stats. Ann., §161.001, et seq.), Wyoming (Wyo. Stats. Ann., §35-347.1, et seq.); the 2 territories are: Puerto Rico (24 P.R.L. Ann., §2101, et seq.), Virgin Islands (19 V.I.C. Ann., §591, et seq.).

** Calif. Health & Safety Code §§11158, 11160, 11167; Idaho Code, §§37-2722, 37-2730, Ill. S.H. Ann., ch. 56½, §§1308, 1311, 1312(a).

prescription of the practitioner* and there is no requirement for the use of a triplicate prescription form or the disclosure of the patient's name to the State. Typically, the pharmacist is required to maintain records of prescriptions filled, in accordance with the federal law** and such additional rules as the state department may promulgate.*** Such records must be maintained for a designated period, typically two years.****

* Uniform Controlled Substances Act, §308(a); Ala. Code, Tit. 22, §258(46); Ark. Stats. §82-2616(a); Conn. Gen. Stats. Ann., §19-457; 16 Del. Code Ann., §4738; Fla. Stats. Ann., §398.07; Hawaii Rev. Stats., §329-38; Indiana Code, 1971, §35-24.1-3-8; Ia. Code Ann., §204.308; Kan. Stats. Ann., §65-4123; Ky. Rev. Stats., §218A.180; La. Stats. Ann.-Rev. Stats., §40.978; Md. Code Ann., Art. 27, §285; Mass. L. Ann., c. 94C, §17(a); Mich. Comp. L. Ann., §335.338(1); Minn. Stats. Ann., §152.11(1); Miss. Code Ann., 1972, §41-29-137(a); V.Ann. Mo. Stats., §195.060(1); R.C.M., 1947, Ann., §54-322(1); Neb. Rev. Stats. Supp. 1971, §28-4, 124(1); Nev. Rev. Stats., 453.256(1); N.J. Stats. Ann., 24:21-15 (a); N.M. Stats. Ann., 1953, §54-11-18(A); N.C. Gen. Stats., 90-106(a); N.D. Cent. Code, 19-03.1-22(1); 63 Okla. Stats. Ann., §2-309(A); 35 Penn. Stats. Ann., §780-111(a); S.C. Code 1962, §32-1510.48(a); S.D. Comp. L. Ann., §39-17-83; Tenn. Code Ann., §52-1431(a); V. Ann. Civ. St., Art. 4476-15 §3.08(a); Utah Code Ann., 1953, 58-37-6(7)(c); Va. Code 1950, §54-524.67(a); Rev. Code Wash. Ann., §69.50.308; W. Va. Code, §60A-3-308(a); Wis. Stats. Ann., §161.38(1); Wyo. Stats. Ann., §35-347.30(a); 24 P.R.L. Ann., §2308(a); 19 V.I.C. Ann., §603(a).

** The Federal statute requires that records be kept for at least two years, 21 U.S.C. §827(b)(3).

*** See e.g., Uniform Controlled Substances Act §306; Ala. Code, Tit. 22, §258(44); Ia. Code Ann., §204.306; Mich. Comp. L. Ann., §335.331(1); Miss. Code Ann., 1972, §41-29-125; Nev. Rev. Stats., §453.246; N. J. Stats. Ann., 24:21-13; N. C. Gen. Stats., §90-100; N. D. Cent. Code, §19-03.1-20; 63 Okla. Stats. Ann., §2-307; S. C. Code 1962, §32-1510.46; Tenn. Code Ann., §52-1429; Utah Code Ann., 1953, §58-37-6(1), (5); Rev. Code Wash. Ann., §69.50.306; W. Va. Code, §60A-3-306; Wyo. Stats. Ann., §35-347.23.

**** See e.g., Ia. Code Ann., §204.306 (2 years); La. Stats.-Ann. Rev. Stats. §40:976 (2 years); Md. Code Ann., Art. 27, §283 (2 years); Mass. L. Ann., ch. 94C §23(e) (2 years); Minn. Stats. Ann., §152.101(1) (2 years); V. Ann. Mo. Stats., §195.060(1) (2 years); Neb. Rev. Stats., Supp. 1971, §28-4, 122 (2 years); N. M. Stats. Ann. 1953, §54-11-16(D) (3 years); S. D. Comp. L., §39-17-82 (2 years); Va. Code, 1950, §54-524. 56(a) (2 years).

In addition, in all but thirteen of the states that do not require filing (and in both territories), the State is permitted to inspect the records of pharmacists under carefully designated conditions such as are set forth in the Uniform Act.*

Moreover, in fourteen of the non-filing states' statutes there is a provision for protection of the physician-patient relationship substantially identical to that found in the Uniform Act.**

This Court has recognized that where other states have adopted less restrictive legislation that is a factor to be considered in determining whether the challenged legislation is constitutionally justifiable (see e.g., *Doe* v. *Bolton, supra,* at 194 n.15 and accompanying text, where the Court relied on just such factors in holding unconstitutional a requirement of hospital accreditation as a pre-condition to a permissible abortion).

• • •

The State made absolutely no showing to the Court below that the massive filing of patients' names (1.5 million per

* Uniform Controlled Substances Act §502; Ark. Stats. §82-2626; Conn. Gen. Stats. Ann., §19-468; Hawaii Rev. Stats. §329-52; Indiana Code, 1971, §35-24.1-5-2; Ia. Code Ann., §204.502; La. Stats. Ann.-Rev. Stats. §40:986; Md. Code Ann., Art. 27, §294; Mass. L. Ann., ch. 94C §30; Mich. Comp. L. Ann., §335.352; Miss. Code Ann., 1972, §41-29-157; V. Ann. Mo. Stats., §195.160; Neb. Rev. Stats., Supp. 1971, §28-4, 132; Nev. Rev. Stats., §453.261; N. J. Stats. Ann., 24:21-32; N. M. Stats. Ann., 1953, §54-11-30; N. D. Cent. Code §19-03.1-33; 35 Penn. Stats. Ann., §780-124; S. C. Code 1962, §32.1510.62; Utah Code Ann., 1953, §58-37-10; Rev. Code Wash. Ann., §69.50.501-502; W. Va. Code, §60A-5-502; Wis. Stats. Ann., §161.52; Wyo. Stats. Ann., §35-347.46; 24 P.R.L. Ann., §2511; 19 V.I.C. Ann., §622.

** Uniform Controlled Substances Act §504(c); Ark. Stats. §82-2628(c); Hawaii Rev. Stats., §329-54(c); Indiana Code, 1971, §35-24.1-5-4(c); Ia. Code Ann., §204.504(3); Mass. L. Ann., ch. 94C §24(f); Mich. Comp. L. Ann., §335.354(3); Nev. Rev. Stats., §453.296; N. M. Stats. Ann., 1953, §54-11-39(D); N. D. Cent. Code, §19-03.1-35(3); 35 Penn. Stats. Ann., §780-137(c); Tenn. Code, Ann., §52-1442(c); V. Ann., Civ. St., Art. 4476-15, §5.02(c); W. Va. Code, §60A-5-504(c); cf. V. Ann. Mo. Stats., §195.260 (when not deemed privileged).

year) is warranted by some valid enforcement purpose. By June 1974, the last date for which defendant gave plaintiffs information, only two cases were thought to have been discovered of situations in which patients had gone from doctor to doctor obtaining excessive supplies of Schedule II drugs and neither of those cases resulted in detection of an actual "doctor to doctor" violation.

We submit that the Court below was plainly correct in holding that "[t]he diminution of a constitutionally guaranteed freedom is too great a price to pay for such a small governmental yield" (403 F.Supp. at 937; J.S. at 11a).

B. The State Has Failed to Take Reasonable Precautions to Maintain Security of the Computerized Information.

In its opinion herein, the Court of Appeals held that even if there were some need for the challenged provisions, the State could be required to take reasonable precautions to limit the risk to privacy, stating (480 F.2d at 108-9; 53a):

> "Without questioning the seriousness of the problem [of drug abuse], plaintiffs respond that these abuses could be adequately controlled without central filing, or by central filing without patient's names, and that the added efficiency is not worth the price in terms of risk of disclosure.
>
> On this last point something turns on how great the risk is. While the Constitution does not condemn a state to using ineffective means in dealing with a problem as serious as the use of the opiates and stimulants listed in Schedule II, it may well condition use of a more effective means which involves a danger to constitutionally-protected privacy on the taking of all reasonable precautions to limit the risk."

Accordingly, the Court remanded for "further exploration of the degree of need for central filing including the patients' names on the one hand, and the adequacy of the provisions

to protect against careless or malicious disclosure on the other" (480 F.2d at 109; 54a).

The three-judge court, finding no need for the challenged provisions, concluded that "[t]he bases for our decision make unnecessary an evaluation of the operative state measures to insure confidentiality" (403 F.Supp. at 938; J.S. 13a).

For the same reason—the lack of any need for the challenged provisions—we respectfully submit that this Court, too, need not consider the reasonableness of the State's precautions to limit the risk of disclosure of confidential information. Nevertheless (and without conceding the existence of any need) so that this Court will have all salient facts before it we turn to a consideration of the question of security.

1. *The Executive Branches of Federal and State Governments Have Not Been Able to Maintain Security of Confidential Information.*

Preliminarily we note that, for whatever reason, recent times have provided an unprecedented plethora of examples of governmental abuses threatening the individual's right of privacy, Senate Report No. 93-1183, *supra*, at 65. These include the attempt to steal the records of Dr. Ellsberg's psychiatrist (see e.g., N. Y. Times, April 28, 1973, at p. 1, col. 4), the revelation of a government-compiled "enemies list" of individuals selected for harassment or disfavor (see e.g., N. Y. Times, June 27, 1973, at p. 49, cols. 1-2; N. Y. Times, June 28, 1973, at p. 1, col. 5) and repeated allegations that military and law enforcement agencies have collected massive dossiers of persons engaged in political activity (see e.g., The Washington Post, January 19, 1975, at p. A-1, col. 7 [FBI dossiers on members of Congress] and The Washington Post, December 24, 1974, at p. A-1, col. 7 [allegations of CIA surveillance of domestic political activity]).

The unauthorized release of confidential information has also been common (see generally, Hearings on H.R. 9527 and Related Bills Before a Subcomm. of the House Comm. on Government Operations, 92nd Cong. 2d Sess. (1972) at pp. 92-3, 216 relating to such release of confidential information by governmental employees, and by the FBI).

There have been similar reports relating to New York State Government and the New York Department of Health. In March 1973, New York State Senator Joseph R. Pisani, Republican of Westchester, was quoted as stating, with regard to the illusory nature of security of the information required to be filed under the new triplicate prescription drug law which was about to go into effect at that time: "Why, I've obtained information that the State lists as confidential" (New York Times, March 18, 1973, p. 64, col. 1).

On January 1, 1975, the New York Times published excerpts from a memorandum from Dr. Andrew C. Fleck, Jr., First Deputy Commissioner in charge of medical-care services, concerning the Park Crescent Nursing Home (New York Times, p. 1, col. 8 and p. 15, cols. 1-4). The Times reported that "Dr. Fleck denounced the leak."*

It is well recognized that, notwithstanding the prohibition on inspection of family court files and New York City regulations on confidentiality, highly sensitive arrest and police records have routinely been made available to outsiders. See generally *In the Matter of Earl Smith and Ricardo Vasquez,* 310 N.Y.S.2d 617, 620 (Fam.Ct., N.Y.Co.

* Similarly, on September 17, 1973, under the headline "Hogan: Stroke and Lung Cancer", the New York Post published a photocopy of the supposedly confidential medical record maintained by St. Luke's Hospital with respect to Frank Hogan, then District Attorney of New York County. On the following day, the New York Times reported that the Executive Vice-President of St. Luke's Hospital said he was "incensed"; that the hospital was conducting an investigation into "leaks of medical records"; and that "files covering a three week period had somehow been uncovered or copied." (New York Times, September 18, 1973, p. 1, col. 5-6.)

1970); see also *Menard* v. *Mitchell,* 328 F. Supp. 718, 721-2 (D.D.C. 1971).

Another telling illustration of the lack of security of information gathered and "protected" by the State is the damning "Audit Report on Financial and Operating Practices of the New York State Identification and Intelligence System" prepared by the Office of the Comptroller of the State of New York (Ex. 29). Although a different system than the one here at issue, it too is maintained by the State of New York and the need for absolute security in the maintenance of the information it contains, fingerprint and criminal identification files, is also obvious. Yet the Office of the Comptroller found that the State knowingly permitted representatives of the United States Army and Navy to roam at will through the fingerprint files of the New York State Intelligence and Identification System even though they were not authorized to do so under the law (Ex. 29, pp. 6, 24-5). The report stated (Ex. 29, p. 6):

> "Personnel from the United States Army and Navy are permitted to search the files although these agencies are not specified in Article 21 of the Executive Law as authorized agencies."

In addition, the Comptroller's Office found serious security problems ranging from the location of the facility in a private office building to the lack of a formal training program and security clearance program for personnel with access to the confidential information (Ex. 29, pp. 2, 26-33).

2. *The Evidence Demonstrates That the System to Safeguard the Confidential Information Collected under Article 33 Is Entirely Inadequate.*

The evidence in this case confirms the illusory nature of the "security" of the computerized information held by the Department of Health. The only evaluation of the

State's system came from Mr. Joseph J. Wasserman, an acknowledged expert in the area of security of computerized data (297a-300a; Ex. 41). Mr. Wasserman, who examined the State's computer facility in Albany, concluded that security there was entirely inadequate and that there was a substantial risk of unauthorized disclosure of the triplicate prescription information maintained there (321a).

For example in addition to inadequate physical protection against unauthorized access, Mr. Wasserman observed the most obvious defects in the systems and procedures as to the manner in which access to the data center was to be protected. There were no background, drug or credit checks made of personnel handling the information, no periodic re-checks of employees, and no checks of personnel not employed by the Department of Health (e.g., personnel charged with maintenance of computers) (308a, 304a, 333a-334a). Temporary employees were employed in sensitive areas. Such failures contravene the most elementary business security proecedures (308a-309a).

Other such failures in the system included the absence of any on-going program for computer security to insure that the employees will not forget that they are working with confidential data (342a-343a); the failure to provide any security manual (309a, 312a, 334a-335a); and the failure to encrypt or encode sensitive items of information so that they cannot simply be printed out by anyone who gains access to the computer (313a, 335a-336a).

Additional failings noted by Mr. Wasserman included inadequate storage facilities (313a-314a, 340a, 357a-358a); lack of procedures for shredding printouts (315a, 340a-341a); failure to require presence of a representative of management when computer operations with respect to triplicate prescription operations were run (341a, 316a) to be sure that the tape was not being duplicated (316a);

failure to erase memory of the computer after processing of the prescription information (341a, 314a-315a); leaving data in disc form in the machine overnight (314a); and absence of controls for printed reports delivered from one area to another (315a-316a).

No witness proffered by the State was (or purported to be) an expert in assuring the security of computerized information. No witness had the temerity to assert that the State's security system was adequate. The State has carefully avoided any discusion of the efficiency of its security system in its brief to this Court and the best it could claim to the Court below was that "Mr. Wasserman's thoughts are of value, and indeed many have been implemented" (Defendant's Post-Trial Br., p. 28). But Mr. Wasserman, who heard all the testimony of Messrs. Bonacci and Cannizzaro as to such "implementation", testified that such testimony did not change his conclusion that the State's security system was wholly inadequate (329a), and that the vast majority of his suggestions were not implemented (329a-346a).*

The spurious nature of the State's "security system" was further confirmed by the fact that many of the very same criticisms made by Mr. Wasserman had been in the Comptroller's Report as to the security of the New York State Intelligence and Identification System (Ex. 29, pp. 27-31; 317a-319a). Nevertheless, no steps had been taken by the Department of Health to implement suggestions contained

* The State cites the provisions of § 3370 requiring destruction of records within five years (Appellant's Br., pp. 32, 33, 34, 37, 39, 46, 47). The cited section (enacted in response to this action), however, merely requires destruction of "any record received by [the Department of Health] pursuant to the filing requirements of" §§3331(6), 3333(4) and 3334(4). The records referred to are the official New York State prescription forms, *not* the tapes or any other records made therefrom. Moreover, a further provision of §3370 authorizes the copying of such records by other state licensing and regulatory officials and there is no provision for destruction of those copies (see §3370(2)).

therein such as guards, a formal training program, a badge identification system and numerous other suggestions made in 1971 (318a-319a).

Moreover, neither Mr. Cannizzaro nor Mr. Bonacci had any understanding as to why the Schedule II information should be kept confidential, apart from the requirements of the Act (478a-479a; Bonacci Tr. Dep. 73-75). Both testified in their view the computerized centralization of data did not increase the risk of unauthorized disclosure (479a; Bonacci Tr. Dep. 73-75). As Mr. Wasserman remarked, when security programs are left under the supervision of individuals who do not understand the increased threat to privacy resulting from the fact that large quantities of information can be stored on a few reels of tape, that attitude in itself must considerably lessen the effectiveness of security procedures (344a-345a).

The State's indifference to security problems (except as a temporary tactical expedient in connection with this action*) was further demonstrated by the fact that Mr. Cannizzaro, who is charged with the responsibility of deciding when to turn over information to Mr. Bellizzi, head of the Bureau of Narcotic Control, did not even know the manner in which the Bureau of Narcotic Control utilized the information which he provided (428a-429a). Under these circumstances, it is difficult to comprehend how Mr. Cannizzaro could make a rational determination as to whether to turn information over to Mr. Bellizzi.

Finally, Mr. Wasserman has testified that *no* computer system is absolutely safe (323a). Many factors within the system may change in ways which create serious dangers of disclosure. The present computerized system, the security regulations, the administrative structure, the computer

* Mr. Bellizzi frankly admitted that in the absence of this action he would have always had free access to all the computerized data, without having to go through Mr. Cannizzaro (Ex. 39, at p. 71).

program and so forth are not mandated by the Act. The number of employees may change. Investigative techniques may be used by the State in ways which give many persons access to the information. The present list of printouts may be increased so that all patients' names are printed out for investigative purposes. The system could be tied into the federal computerized system by force of federal law.* Many of these changes are beyond the continuing scrutiny of the courts or of any person outside the State government.

3. *Article 33 Does Not on Its Face Insure Confidentiality.*

The State, relying principally on §3371, argues that the Act on its face insures the confidentiality of the triplicate prescription data (Appellant's Br., pp. 32-35). Yet, as was made clear by Judge Friendly in his opinion in this case, the mere enactment of a section purporting to prevent disclosure cannot immunize the statute from constitutional attack. Rather, the State must demonstrate that it has taken "all reasonable precautions" to insure confidentiality by statute, regulation or otherwise (53a; 480 F.2d at 109). The Act as drafted and amended cannot insure the required degree of confidentiality.**

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* Both Mr. Bonacci, present head of OEDP for the Department of Health, and his predecessor Mr. Gottheim, have testified that, although the triplicate prescription data is not presently connected to terminals outside the office building in Albany where the computer tapes are kept, several other types of information maintained by the State are connected to approximately 22 different terminals (Bonacci Tr. Dep. 77; Gottheim in Ex. 40, p. 22) and it would be a simple matter to make the mechanical adjustments necessary to provide terminal access to computerized triplicate prescription information (Bonacci Tr. Dep. 39-40; Gottheim in Ex. 40, p. 85).

** While amendment of the statute has cured the ambiguity criticized by Judge Friendly (Appellant's Br., pp. 32-35), we show herein that this is only one example of the generally "open-ended" (53a; 480 F.2d at 109) nature of the statute that in Judge Friendly's view rendered it ineffective as a means of insuring confidentiality.

First, regardless of the Act, as shown above there is no need for this collection of vast volumes of personal data (*supra,* pp. 37-53) and the uncontradicted evidence at trial was that under the State's existing security arrangements the danger of unauthorized access is substantial (*supra,* pp. 56-60).

Second, the Act's limits on both disclosure within the Department and inter-agency transfer of the triplicate prescription data are open-ended. Transfer within the Department is required only to be "for purposes of executing provisions of this article" and inter-agency transfer is virtually unlimited provided the agency is one "authorized to regulate, license or otherwise supervise a person who is authorized by this article to deal in controlled substances or in the course of any investigation or proceeding by or before such agency, department or board." As to the dangers of inter-agency data transfer, see S. Rep. No. 93-1183, *supra,* p. 24.

Third, a revealing contrast is provided by the Federal Privacy Act (5 U.S.C. §552a) which applies to all individual records maintained by the federal government (§552a(a)(4)) and thus extends to records much less sensitive than individual medical records.

The Privacy Act (1) requires federal agencies to maintain an accurate accounting of disclosures of individual records (described in S. Rep. No. 93-1183, *supra,* at p. 53 as "an essential element of the Code of Fair Information Practice") (5 U.S.C. § 552a(c)); (2) requires individual access to records (§ 552a(d)); (3) requires agencies to establish rules of conduct for persons involved with individuals' records, to instruct such individuals in the requirements, and "to establsh appropriate administrative, technical, and physical safeguards to insure the security and confi-

dentiality of records" (§§ 552a(e)(9)(10)); and (4) provides individuals with a civil remedy when an agency fails to comply with privacy provisions (§ 552(g)(1)).

Similarly, the federal "Professional Standards Review" law (47 U.S.C. § 1320c), at issue in a case relied upon by the State (Appellant's Br., pp. 19-20, 33-35), *Association of American Physicians & Surgeons* v. *Weinberger,* 395 F. Supp. 125 (N.D. Ill. 1975), *aff'd sub nom., Association of American Physicians & Surgeons* v. *Mathews,* —— U.S. ——, 96 S. Ct. 388 (1975) requires, as the court therein noted, utilization of "methods of coding which will provide maximum confidentiality as to patient identity." (395 F. Supp. at 130, 135). In the instant case, Article 33 does not require coding, and the State does not carry out such coding in practice (313a, 335a, 407a-408a).

In the case of records relating to drug abuse prevention, federal law (21 U.S.C. §1175) also provides a much greater degree of confidentiality than does §3371. Thus, without a patient's permission, such records may be disclosed only in *bona fide* medical emergencies, for the purpose of research and audits providing patient indentities are not disclosed directly or indirectly, and upon court order (21 U.S.C. §1175(b)(2)). Use of such records in criminal investigations of patients is specifically prohibited (21 U.S.C. §1175(c)). In addition a comprehensive set of regulations (42 C.F.R. §§2.1-2.67-1) has been promulgated to implement 21 U.S.C. §1175. See also 21 U.S.C. §873(b). By contrast, Article 33 specifically permits access in criminal investigations (§3371(b)).

In short, none of the elemental safeguards of the federal statutes are present to protect confidentiality of records collected under Article 33, the statute itself allows open-ended inter-agency transfer, and no viable security has been provided for the records.

POINT IV

Plaintiffs herein Clearly Have Standing to Sue.

To a large extent, the State's arguments regarding plaintiffs' standing to sue merely repeat its arguments on the merits.* To the extent that appellant does challenge plaintiffs' standing to bring the instant action, the State's arguments were properly rejected by both the Court of Appeals when it directed that a three-judge court be convened and the three-judge court when it denied appellees' motion for a preliminary injunction. Thus, the three-judge court stated (364 F. Supp. at 540, n. 6):

> "6. The physicians are not here merely asserting the rights of their patients but claim independent violations of protected constitutional rights. *Their standing to sue is established by Doe* v. *Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). *See also, Roe* v. *Ingraham,* 480 F.2d 102 (2d Cir. 1973), at n. 5. Although it is unclear from the complaint, the Physicians Guild is apparently suing on behalf of its doctor members. Inasmuch as its claims are only repetitive, we may assume proper standing exists. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925)" (emphasis added).

And Justice Marshall stated in denying the State's application for a stay: "Likewise, the court's conclusion that respondents had standing seems in accord with the liberal standing decisions of this Court" (J.S. 43a).

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* For example, "[C]entralized collection, as a means of furthering a legitimate state objective, is not an invasion of privacy, and thus any challenge to same does not present a real case." (Appellant's Br., p. 42).

Nor can it seriously be disputed that the physicians and the patients who are plaintiffs herein have the required "personal stake in the outcome of the controversy", *Baker* v. *Carr,* 369 U.S. 186, 204 (1962), and that there is a "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast* v. *Cohen,* 392 U.S. 83, 95 (1968). See also *Buckley* v. *Valeo,* ——U.S.——, 96 S.Ct. 612, 631 (1976).

The present statute interferes with the freedom of the physician plaintiffs to practice medicine according to the highest medical standard, *Doe* v. *Bolton,* 410 U.S. 179, 199 (1973); *Nyberg* v. *City of Virginia,* 361 F.Supp. 932, 936 (D.Minn. 1973), *aff'd* 495 F.2d 1342 (8th Cir. 1974). Thus, the *Roe* complaint alleges that the statute "infringes on the doctor's right to prescribe treatment for his patients solely on the basis of medical considerations" (11a at par. 11). And the uncontradicted record proof in this case is that a plaintiff psychiatrist terminated the use of Schedule II drugs which he deemed helpful to patients suffering from certain psychiatric disorders because the fears created by the filing requirement would undermine the patient's trust and confidence in the psychiatrist (154a-155a, 168a-169a), and that it became impossible for several physician plaintiffs to use Schedule II drugs in treating patients who needed such drugs after patients learned of the filing requirements (177a-181a, 186a-187a, 213a-214a).

A further basis for the standing of the physician plaintiffs is that the physician is the one against whom the license revocation sanctions of Article 33 operate if he prescribes or dispenses Schedule II drugs without causing a prescription form containing the patient's name to be filed in Albany (§3390(2)). See *Doe* v. *Bolton,* 410 U.S. 179, 188-9 (1973); *Abele* v. *Markle,* 452 F.2d 1121 (2d Cir. 1971); *Nyberg* v. *City of Virginia,* 361 F.Supp. 932, 936 (D.Minn.

1973), *aff'd* 495 F.2d 1342 (8th Cir. 1974). Here, as in *Doe* v. *Bolton, supra,* there is, thus, a "sufficiently direct threat of personal detriment" (410 U.S. at 188).

The facts that the patient plaintiffs have not suffered economic injury and that many other persons are also injured do not deprive plaintiffs of standing. *United States* v. *SCRAP,* 412 U.S. 669, 686 (1973). In the *SCRAP* case, the injury alleged was that the failure of the Interstate Commerce Commission to suspend a 2.5% rate increase might adversely affect plaintiffs' "use and enjoyment of the natural resources of the Washington area" (p. 687). This Court summarized the "attenuated line of causation to the eventual injury" alleged by plaintiffs as follows (p. 688):

> "Here the Court was asked to follow a far more attenuated line of causation to the eventual injury of which the appellees complained—a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area."

Nevertheless, this Court held that plaintiffs had standing and explained its earlier holding in *Sierra Club* v. *Morton,* 405 U.S. 727 (1972) as follows (at pp. 686-7):

> "Nor, we said, could the fact that many persons shared the same injury be sufficient reason to disqualify from seeking review of an agency's action any person who had in fact suffered injury. Rather, we explained: 'Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less

deserving of legal protection through the judicial process.' Id., at 734."

And further (p. 689, fn. 14):

"The Government urges us to limit standing to those who have been 'significantly' affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. 'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see Baker v. Carr, 369 U.S. 186; a five-dollar fine and costs, see McGowan v. Maryland, 366 U.S. 420; and a $1.50 poll tax, Harper v. Virginia Bd. of Elections, 383 U.S. 663. While these cases were not dealing specifically with §702 of the APA, we see no reason to adopt a more restrictive interpretation of 'adversely affected' or 'aggrieved.' As Professor Davis has put it: 'The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.' Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613. See also K. Davis, Administrative Law Treatise §§22.09-5, 22.09-6 (Supp. 1970)."

Here, the patient plaintiffs are aggrieved in a direct, substantial and specific manner. Their right to private medical advice is not infringed by any "attenuated line of causation" such as the Court referred to in the *SCRAP* case. The challenged provisions of the Act, by requiring that a prescription form be filed with the State which contains, *inter alia*, the patient's name, address, age, medication and physician, clearly and directly invade the patient's privacy by requiring disclosure of intimate information to the State (see pp. 20-25 *supra*).

In *California Bankers Assn.* v. *Shultz*, cited by appellant (Appellant's Br., pp. 46-47), the Court held that the depositor plaintiffs lacked standing to challenge the domestic reporting provisions of the Bank Secrecy Act, as effectuated by regulations which required banks to report currency transactions in excess of $10,000 "because there was no allegation by any individual depositor that they were engaged" (416 U.S. at 68) in such a transaction. The Court stated (416 U.S. at 67-8):

"In addition to the Fourth Amendment challenge to the domestic reporting requirements made by the bank plaintiffs, we are faced with a similar challenge by the depositor plaintiffs, who contend that since the reports of domestic transactions which the bank is required to make will include transactions to which the depositors were parties, the requirement that the bank make a report of the transaction violates the Fourth Amendment rights of the depositor. The complaint filed in the District Court by the ACLU and the depositors contains no allegation by any of the individual depositors that they were engaged in the type of $10,000 domestic currency transaction which would necessitate that their bank report it to the Government. * * * [W]e simply cannot assume that the mere fact that one is a depositor in a bank means that he has engaged or will engage in a transaction involving more than $10,000 in currency, which is the only type of domestic transaction which the Secretary's regulations require that the banks report. That being so, the depositor plaintiffs lack standing to challenge the domestic reporting regulations, since they do not show that their transactions are required to be reported."

In the present case, every one of the patient plaintiffs testified that he, or the child for whom he brought this

action, had been prescribed Schedule II drugs and thus were engaged in the type of event that would result in their physician or pharmacist reporting it to the State government (117a-118a, 137a-138a, 140a-141a, 196a, 211a-212a).

Moreover, the injury to plaintiffs herein is far more serious than that alluded to by the two concurring and three dissenting justices in *Shultz* and the majority in *SCRAP*. As shown at length above (pp. 20-25), the reporting requirements of the Act clearly "touch upon intimate areas of an individual's personal affairs" (Powell, J. concurring in 416 U.S. at 78). The Court of Appeals herein has already taken judicial notice of the fact that an individual's prescriptions often reveal the nature of his ailment (see 480 F.2d at 108, n.7). As a result of the challenged statute, such information about thousands of individuals is transmitted to the State without the necessity of a warrant or any opportunity for a patient to prevent its transmittal. As Justice Powell said "the potential for abuse is particularly acute where . . ., the legislative scheme permits access to this information without invocation of the judicial process" (416 U.S. at 79).

With regard to the plaintiff physician's organizations, we submit that their standing to assert claims on behalf of their members to practice medicine according to the highest medical standards is analagous to that of an organization to "assert, on behalf of its members, a right personal to them to be protected from compelled disclosure of their affiliation . . ." *NAACP* v. *Alabama,* 357 U.S. 449, 459 (1958) quoted in *Buckley* v. *Valeo, supra,* at 96 S. Ct. 631 n. 10.

Appellant relies on this Court's decision in *Laird* v. *Tatum,* 408 U.S. 1 (1971) in arguing that the instant plaintiffs lack standing. However, in that case the Court described the challenged action as "the threat . . . that *in some future civil disorder* of some kind, the Army is going

to come in with its list of troublemakers . . . and go rounding up people and putting them in military prisons somewhere" (emphasis in original) (408 U.S. at 9 n. 5). The Court in summarizing past standing decisions stated (408 U.S. at 11):

> "[I]n each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging."

In the instant case, plaintiffs' challenge is directed at the present compulsory collection of data for prescriptions of Schedule II drugs for the plaintiff patients prescribed by the plaintiff doctors. See *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965) discussed in *Laird* v. *Tatum, supra,* at 12.

Appellant also relies on *Schlesinger* v. *Reservists Comm. to Stop the War,* 418 U.S. 208 (1974). In that case, this Court reaffirmed its prior decisions regarding plaintiffs who urged only their status as citizens and taxpayers in challenging federal statutes on constitutional grounds. In the present case, plaintiffs do not rely on such status but rather on their status as doctors and patients directly affected by the triplicate prescription program.

Under these circumstances, we submit the Court below was clearly correct in holding that plaintiffs herein had standing to sue.

Conclusion

The State has failed to demonstrate any need ("compelling" or otherwise) which justifies its system of continued monitoring of persons who take Schedule II drugs under the supervision of licensed physicians, for no reason other than to relieve pain and mitigate the effects of serious disease. On the contrary, the uncontradicted record proof in this case shows that the centralized collection of patients' names is not necessary or even appropriate to detect over-prescribing physicians, over-dispensing pharmacists or individuals who forge or steal prescription blanks. And as to individuals who supposedly go from "doctor to doctor" to obtain excessive amounts of Schedule II drugs (which persons, the State continues to assert, its system will aid in detecting), the record proof is also uncontradicted that such cases have been utterly insignificant historically (4 cases in the 7 years prior to trial) and have continued to be *de minimis* since institution of the present system (2 case reports referred for investigation).

We submit that Article 33's filing provisions violate the reasonable expectations of thousands of citizens that they may keep to themselves the nature of their treatment and illnesses and may maintain the confidentiality of communications with their physicians. There is and can be no reasonable basis for suspecting the overwhelming majority of persons utilizing Schedule II drugs or for prying into their personal affairs. The suggestion that the State has a security system which will preserve the confidentiality of such information is belied by the evidence in this case as well as by the innumerable examples of leaks of supposedly confidential information at all levels of our government.

We urge that the State's system is a totally unjustified intrusion into what Justice Brandeis described in his dissent in *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928),

as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

For the reasons set forth above and based upon the evidence adduced at trial, appellees submit that this Court should affirm the final order and judgment of the Court below permanently enjoining enforcement of, and declaring unconstitutional, those provisions of Article 33 of the New York Public Health Law which require physicians to record the identity of their patients on copies of prescription forms filed with the State.

Respectfully submitted,

Dated: New York, New York
July 16, 1976

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* The able assistance of Marilyn Marlek of the Georgetown University Law Center is acknowledged.

ADDENDUM

PRE-TRIAL ORDER NO. 2 ON CONSENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD ROE, an infant, by ROBERT ROE, his parent, et al.,
Plaintiffs,

and

GEORGE PATIENT, et al.,
Intervenors,

against

HOLLIS S. INGRAHAM, as Commissioner of Health of the State of New York,
Defendant.

On November 19, 1974, the attorneys for the parties to this action appeared before the Court at a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure and, as a result thereof, the following action has been taken:

1. The testimony of plaintiffs' expert witnesses and defendant's witnesses will be submitted to the Court in deposition form, which depositions will be held at the offices of Shea Gould Climenko & Kramer at the following times, unless the parties agree otherwise:

Dr. Jerry M. Rosenberg	—December 4, 1974, commencing at 9:30 A.M.
Joseph Wasserman	—December 4, 1974, commencing at 2:00 P.M.
Joseph L. Cannizzaro	—December 5, 1974, commencing at 9:30 A.M.
Joseph Bonacci	—December 5, 1974, commencing at 2:00 P.M.
Joseph Wasserman (rebuttal)	—December 6, 1974, commencing at 9:30 A.M.

Pre-Trial Order No. 2 on Consent

2. Post-Trial Proposed Findings of Fact and Conclusions of Law and briefs of all parties will be submitted no later than four weeks after the parties' attorneys have received copies of the trial transcript and of the transcripts of the above depositions. Within two weeks after all such papers have been submitted, all parties shall submit post-trial reply briefs, if any.

3. The Pre-Trial Order on Consent made herein on November 18, 1974 remains in full force and effect, except as modified hereinabove.

/s/ Robert L. Carter
U.S.D.J

Dated: New York, New York
November 21, 1974

CONSENTED TO:

Shea Gould Climenko & Kramer

By Michael Lesch
A Member of the Firm
Attorneys for Plaintiffs

CONSENTED TO:

Norwick Raggio & Jaffe

By Miles Jaffe
A Member of the Firm
Attorneys for Intervenors

CONSENTED TO:

Louis Lefkowitz, Esq.

By A. Seth Greenwald
Assistant Attorney General of
the State of New York
Attorney for Defendant